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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED CONTINENTAL TUNA CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	5
Reasons for granting the writ	6
Conclusion	20
Appendix A	1a
Appendix B	9a
Appendix C	16a
Appendix D	17a

CITATIONS

Cases:

Aliotti v. *United States*, 221 F. 2d 598	11
Amell v. *United States*, 384 U.S. 158	8, 15
American Stevedores v. *Porello*, 330 U.S. 446	8
Beeler v. *United States*, 224 F. Supp. 973, reversed on other grounds, 338 F. 2d 687	16
Bulova Watch Co. v. *United States*, 365 U.S. 753	18
Calmar Steamship Corp. v. *United States*, 345 U.S. 446	11, 12, 16
Canadian Aviator, Ltd. v. *United States*, 324 U.S. 215	8
Compania Ithaca De Vapores, S.A. v. *United States*, 124 F. Supp. 627	11-12

Cases—Continued

	Page
D. Ginsberg & Sons, Inc. v. *Popkin*, 285 U.S. 204	18
De Bardeleben Marine Corp. v. *United States*, 451 F. 2d 140	15
Eastern Steamship Lines v. *United States*, 187 F. 2d 957	11
Geo. W. Rogers Const. Corp. v. *United States*, 118 F. Supp. 927	12
Ira S. Bushey & Sons, Inc. v. *United States*, 398 F. 2d 167	15, 16
Johansen v. *United States*, 343 U.S. 427	8
Lake Monroe, The, 250 U.S. 246	8
Lykes Bros. Steamship Co. v. *United States*, 124 F. Supp. 622	12
MacEvoy Co. v. *United States*, 322 U.S. 102	18
Polar Compania De Navegacion v. *United States*, 124 F. Supp. 625	12
Preiser v. *Rodriguez*, 411 U.S. 475	7, 18
Richmond Marine Panama S.A. v. *United States*, 350 F. Supp. 1210	15, 16
Roberts v. *United States*, 498 F. 2d 520	15
Silver v. *New York Stock Exchange*, 373 U.S. 341	7, 17
Sinclair Refining Co. v. *United States*, 124 F. Supp. 628	11
Somerset Seafood Co. v. *United States*, 193 F. 2d 631	10
T. J. Falgout Boats, Inc. v. *United States*, 361 F. Supp. 838, affirmed, December 27, 1974, No. 73-1755 (C.A. 9)	15, 16
Tankrederiet Gefion A/S v. *United States*, 241 F. Supp. 83	15-16

Cases—Continued

	Page
Tebbs v. *Baker-Whitely Towing Co.*, 227 F. Supp. 656	15-16
Utzinger v. *United States*, 246 F. Supp. 1022	15
Waterman Steamship Corp. v. *United States*, 124 F. Supp. 634	11
Wessel, Duval & Co. v. *United States*, 124 F. Supp. 636	11, 12

Statutes:

Federal Tort Claims Act, 28 U.S.C. 1346 (b) *et seq.*	10
Public Vessels Act, 43 Stat. 1112, as amended, 46 U.S.C. 781-790:	2, 4, 5, 6
Sec. 781	4, 6, 10
Sec. 782	4-5, 6, 10, 12, 17, 20
Sec. 784	7, 10, 19
Sec. 785	5, 7, 10
Shipping Act, 39 Stat. 728, 46 U.S.C. 801 *et seq.*:	8
Sec. 808	8
Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 741-752:	2, 5, 6
Sec. 741	2-3, 9
Sec. 742 (1958 ed.)	9
Sec. 742	3-4, 6, 14, 15, 16
Sec. 745	19
Tucker Act, 28 U.S.C. 1346(a)(2), 1491	10
74 Stat. 912	2, 14
10 U.S.C. 7622	20
10 U.S.C. 7721-7730	7, 19
28 U.S.C. 1500	12

Statutes—Continued	Page
28 U.S.C. 2254	18
28 U.S.C. 2401(a)	12
42 U.S.C. 1983	18
46 U.S.C. 763	12
Miscellaneous:	
104 Cong. Rec. 14433-14434	13
H.R. 3046, 85th Cong., 2d Sess.	13
H.R. 5396, 86th Cong., 1st Sess.	13
S. Rep. No. 1894, 86th Cong., 2d Sess.	14

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-8a) is reported at 499 F. 2d 774. The findings of fact and conclusions of law and the judgment of the district court (App. B, *infra*, pp. 9a-15a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1974 (App. C, *infra*, p. 16a), and the court of appeals denied rehearing on August 21, 1974 (App. D, *infra*, p. 17a). On November 14, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including December 19, 1974. On December 11, 1974, the time for filing a petition was further extended by Mr. Justice Douglas to and including January 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether as a result of the 1960 amendment (74 Stat. 912) to the Suits in Admiralty Act, 46 U.S.C. 741-752, suits involving public vessels of the United States need no longer be brought under the Public Vessels Act, 46 U.S.C. 781-790, but may be brought under the Suits in Admiralty Act.

STATUTES INVOLVED

The Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 741, *et seq.* provides in relevant part:

46 U.S.C. 741:

> No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation,

> and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this chapter shall not apply to the Panama Railroad Company.

46 U.S.C. 742:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate non-jury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the

libel has been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

The Public Vessels Act, 43 Stat. 1112, as amended, 46 U.S.C. 781, *et seq.* provides in relevant part:

46 U.S.C. 781:

A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920.

46 U.S.C. 782:

Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in the case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title [the Suits in

Admiralty Act] or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

46 U.S.C. 785:

No suit may be brought under sections 781 to 790 of this title by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts.

STATEMENT

Alleging jurisdiction under the Suits in Admiralty Act, 46 U.S.C. 741-752, and the Public Vessels Act, 781-790, respondent, a Philippine corporation, brought suit against the United States in the district court. Respondent sought recovery for damages resulting from the sinking of its fishing vessel after a collision with the *U.S.S. Parsons*, a naval destroyer of the United States. The district court granted the United States' motion for summary judgment on the ground that the Philippine corporation was a foreign national subject to the reciprocity provision of the Public Vessels Act, 46 U.S.C. 785, and that it had not proved that the Philippine government would consent to be sued if a similar action had been brought against it by nationals of the United States (App. B, *infra*, p. 13a).

The court of appeals reversed, holding that the 1960 amendment to the Suits in Admiralty Act which, *inter alia*, eliminated the requirement in 46 U.S.C. 742 that any vessel involved in a suit under that Act be "employed as a merchant vessel", broadened the jurisdictional reach of that Act to encompass all maritime actions against the United States, including those previously cognizable only under the Public Vessels Act (App. A, *infra*, pp. 5a-8a). The court concluded that since respondent's suit was maintainable under the Suits in Admiralty Act, and since that Act has no reciprocity requirement, the district court should not have granted summary judgment to the United States (App. A, *infra*, p. 8a). In reaching this result the court of appeals acknowledged that it was allowing for the circumvention of the requirement of the Public Vessels Act "in a manner neither explicitly authorized nor perhaps contemplated by Congress" (App. A, *infra*, p. 7a).

REASONS FOR GRANTING THE WRIT

In the Public Vessels Act, 46 U.S.C. 781 *et seq.*, Congress has consented to suits against the United States for damages "caused by a public vessel of the United States" (46 U.S.C. 781). The Act provides that suits shall also be subject to the Suits in Admiralty Act, 46 U.S.C. 741, *et seq.*, to the extent the provisions of the two acts are not inconsistent (46 U.S.C. 782). The Public Vessels Act, however, imposes a number of additional requirements on litigants. Thus, a foreign national cannot bring suit

unless it is established that his government "under similar circumstances, allows nationals of the United States to sue in its courts" (46 U.S.C. 785). In addition, no subpoena can be served on officers or members of the crew of a public vessel without the consent of either the Secretary of the Navy or the Commander of the vessel (46 U.S.C. 784), and in time of war, the Secretary of the Navy may obtain a stay of all proceedings brought under the Public Vessels Act (10 U.S.C. 7721-7730).

In 1960 the Suits in Admiralty Act was amended to resolve a jurisdictional conflict between district courts and the Court of Claims. Nothing in either the language or legislative history of the 1960 amendment suggests that Congress intended to affect the operation of the Public Vessels Act in any manner. The court of appeals nevertheless held in effect that the 1960 amendment to the Suits in Admiralty Act repealed the Public Vessels Act by implication.

The decision of the court of appeals is contrary to settled principles of statutory construction reflected in this Court's decisions. See, *e.g.*, *Silver* v. *New York Stock Exchange*, 373 U.S. 341; *Preiser* v. *Rodriguez*, 411 U.S. 475. Moreover, the decision frustrates congressional intent in a manner that is potentially threatening to United States naval operations.

1. The court of appeals erroneously construed the 1960 amendment to the Suits in Admiralty Act because, we submit, it focused only on the literal wording of the amendment without considering its pur-

pose. As we shall show, there is no indication in the legislative history that Congress intended the 1960 amendment to the Suits in Admiralty Act to affect the Public Vessels Act in any manner (see pp. 16-18, *infra*), and that conclusion is confirmed by considering the amendment against the background of prior maritime legislation.[1]

Before 1916 the doctrine of sovereign immunity precluded a suit by a private owner whose vessel was damaged by the negligent operation of a vessel owned or operated by the United States. The United States could, however, sue private owners for damages to its vessels arising from the owners' negligence. Congressional attempts to deal with this inequity through the mechanism of the private bill proved cumbersome and inadequate. Accordingly, in 1916, when Congress passed the Shipping Act, 39 Stat. 728, 46 U.S.C. 801, *et seq.*, it included a provision that vessels of the old Shipping Board "while employed solely as merchant vessels" would be "subject to all laws, regulations, and liabilities governing merchant vessels" even though the United States owned or had an interest in them. 46 U.S.C. 808.

In 1920 in response to this Court's decision in *The Lake Monroe*, 250 U.S. 246, which held that the Shipping Act subjected Shipping Board vessels to

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[1] The legislative history that follows is recounted in *Johansen* v. *United States*, 343 U.S. 427, 432-434, *American Stevedores* v. *Porello*, 330 U.S. 446, 450-454, and *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 218-225. See also *Amell* v. *United States*, 384 U.S. 158, 164-165.

proceedings *in rem* in admiralty, including arrest and seizure, Congress enacted the Suits in Admiralty Act which prohibits the arrest or seizure of any vessel or cargo owned by or in the possession of the United States, as well as any vessel privately owned but operated for or by the United States (46 U.S.C. 741). The Suits in Admiralty Act waived sovereign immunity, however, in that it authorized (prior to 1960) a libel *in personam* against the United States in cases involving any vessel owned by, or operated for or by, the United States, provided both that the vessel was "employed as a merchant vessel" and that such a proceeding could have been maintained had the vessel been a private vessel.[2] Although the inclusion of "public vessels" under the Suits in Admiralty Act was proposed, Congress was unwilling to extend the Act to cover non-merchant vessels owned by the United States.

In 1925 Congress passed the Public Vessels Act authorizing a libel *in personam* against the United States "for damages caused by a public vessel of the United States" and for compensation for towage and

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[2] Before 1960 the Suits in Admiralty Act, at 46 U.S.C. (1958 ed.) 742, provided in relevant part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. * * *

salvage services rendered to such a vessel. 46 U.S.C. 781. Although the Act specified that suits which it authorized were "subject to" and would "proceed in accordance with" the provisions of the Suits in Admiralty Act "insofar as the same are not inconsistent" with the provisions of the Public Vessels Act (46 U.S.C. 782), it contained special limitations. Thus it prohibited the subpoenaing of officers or members of the crew of public vessels without the government's consent, 46 U.S.C. 784, and it barred any suit by a national of a foreign government unless he could establish that his government, in similar circumstances, would allow nationals of the United States to sue in its courts. 46 U.S.C. 785.

Although the combination of the Suits in Admiralty Act and the Public Vessels Act gave jurisdiction to the admiralty side of federal district courts in all maritime actions against the United States involving vessels, prior to 1960 such jurisdiction did not exist over non-vessel maritime contract or tort claims against the United States. Such maritime contract claims were cognizable only in the Court of Claims (or on the law side of federal district court if the claim did not exceed $10,000) under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, while such maritime tort claims were cognizable only on the law side of federal district court under the Federal Tort Claims Act, 28 U.S.C. 1346(b), *et seq.*[3]

[3] See, *e.g.*, *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4).

Prior to 1960, courts and litigants involved in maritime actions against the United States were faced with two sets of jurisdictional dichotomies: (1) vessel claims versus non-vessel claims and (2) "merchant" vessel claims versus "non-merchant" vessel claims.

In a number of factual contexts it became difficult, if not impossible, for courts to determine whether a claim was a vessel claim, cognizable on the admiralty side of federal district court, or a non-vessel claim, cognizable in the Court of Claims.[4] This con-

[4] For example, in *Eastern Steamship Lines* v. *United States*, 187 F. 2d 957 (C.A. 1), the court held that an action by the private owner of a vessel, which had been chartered by the United States for wartime use, to recover $5 million in restoration costs could not be maintained in federal district court under either the Suits in Admiralty Act or the Public Vessels Act but only in the Court of Claims under the Tucker Act. On the other hand, in *Aliotti* v. *United States*, 221 F. 2d 598 (C.A. 9), the court held on virtually the same facts that such an action was maintainable exclusively on the admiralty side of federal district court under the Public Vessels Act. This Court noticed, but had no occasion to resolve, the conflict, although it warned that "[i]t is not to be assumed that all claims sounding in contract can form the basis of a suit under the Public Vessels Act." *Calmar Steamship Corp.* v. *United States*, 345 U.S. 446, 456, n. 8.

The widespread nature of the problem was reflected in the fact that on a single day in 1954 the Court of Claims dismissed six actions brought under the Tucker Act on the ground that they were cognizable only on the admiralty side of federal district court under the Suits in Admiralty or Public Vessels Acts. *Wessel, Duval & Co.* v. *United States*, 124 F. Supp. 636; *Waterman Steamship Corp.* v. *United States*, 124 F. Supp. 634; *Sinclair Refining Co.* v. *United States*, 124 F. Supp. 628; *Compania Ithaca De Vapores, S.A.* v. *United States*, 124

flict created serious problems for litigants. The Court of Claims had no power to transfer actions erroneously commenced under the Tucker Act to the federal district courts, and since the Tucker Act has a six-year limitation period (28 U.S.C. 2401(a)) while the two admiralty acts have a two-year limitations period (46 U.S.C. 763, 782), litigants who misfiled in the Court of Claims often found that it was too late to file anew in federal district court. Litigants could not protect themselves by filing simultaneously in both courts because under 28 U.S.C. 1500 the Court of Claims has no jurisdiction over, and is bound to dismiss, any claim which is the subject of a pending suit against the United States in any other court. *Wessel, Duval & Co.* v. *United States*, 124 F. Supp. 636 (Ct. Cl.).

Second, courts experienced difficulty determining whether a particular vessel was "employed as a merchant vessel" within the meaning of the Suits in Admiralty Act.[5] As this Court pointed out in *Calmar Steamship Corp.* v. *United States*, 345 U.S. 446, 455,

F. Supp. 627; *Polar Compania De Navegacion* v. *United States*, 124 F. Supp. 625; *Lykes Bros. Steamship Co.* v. *United States*, 124 F. Supp. 622.

[5] Thus in *Calmar Steamship Corp.* v. *United States, supra*, this Court reversed the Second Circuit and held that a privately owned vessel operated for hire by the United States and engaged on a war mission was "employed as a merchant vessel," while in *Geo. W. Rogers Const. Corp.* v. *United States*, 118 F. Supp. 927 (S.D. N.Y.) the court, distinguishing *Calmar*, held that a United States Merchant Marine vessel which was carrying fuel oil for the United States Navy during peacetime was not "employed as a merchant vessel."

the consequence of holding that a vessel was not "employed as a merchant vessel" was usually insignificant where the vessel was publicly owned by the United States since "in the greater number of instances * * * the libel is dismissed under the Suits in Admiralty Act only to be heard under the Public Vessels Act in the same admiralty court." However, where the vessel was privately owned but operated by or for the United States, "to hold that she was not employed as a merchant vessel [was] to relegate the libelant, on a contract claim substantial enough not to be cognizable on the law side under the Tucker Act, 28 U.S.C. (Supp. III) § 1346, to the Court of Claims." *Ibid.* The Court found this troubling because "the District Courts are, in our judicial system, the accustomed forum in matters of admiralty; everything else being equal, no efforts should be made to divert this type of litigation to judges less experienced in admiralty" (*ibid.*; footnote omitted).

Congressional efforts to extricate the courts and litigants from these jurisdictional difficulties began in 1958 when the House of Representatives passed a bill amending Title 28 of the United States Code (Judiciary and Judicial Procedure) to permit the transfer of cases between the Court of Claims and federal district courts.[6] An identical bill[7] was passed

[6] The bill, H.R. 3046, 85th Cong., 2d Sess., was passed on July 21, 1958 (104 Cong. Rec. 14433-14434), but it did not emerge from the Senate Committee on the Judiciary before the expiration of the 85th Congress.

[7] H.R. 5396, 86th Cong., 1st Sess.

by the House in 1959 and considered by the Senate Committee on the Judiciary. During its deliberations the Judiciary Committee received a communication from the Secretary of Commerce, as head of the Federal Maritime Administration, criticizing the House transfer bill as inadequate and recommending direct amendment of the Suits in Admiralty Act in order to "attack the problem on a fundamental basis" and eliminate the problems arising from "uncertainty as to the field of jurisdiction of the Court of Claims and the district courts of the United States." S. Rep. No. 1894, 86th Cong., 2d Sess. 8-11. In accordance with this recommendation, in which the Department of Justice and the Maritime Law Association concurred, the Judiciary Committee added a new section to the House bill which directly amended the Suits in Admiralty Act at 46 U.S.C. 742 in two ways. First, it provided that if an admiralty proceeding could be maintained in a given case "if a private person or property were involved," a similar admiralty proceeding could be brought against the United States. Second, it struck the proviso that if a vessel were involved it had to be "employed as a merchant vessel." This version of the House bill which was reported favorably by the Judiciary Committee became law on September 13, 1960.[8]

[8] 74 Stat. 912. The present version of 46 U.S.C. 742 provides in relevant part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. * * *

The 1960 amendment to the Suits in Admiralty Act removed the "uncertainty as to the field of jurisdiction of the Court of Claims and the district courts of the United States" by effectively eliminating the quasi-admiralty jurisdiction of the Court of Claims. The addition of the phrase "or if a private person or property were involved" to 46 U.S.C. 742 guarantees that those non-vessel maritime contract claims previously held cognizable in the Court of Claims, as well as those non-vessel maritime tort claims previously held cognizable on the law side of federal district court, would now be cognizable on the admiralty side of federal district court.[9] Thus the dichotomy between vessel and non-vessel claims no longer exists.[10]

[9] Not all contract claims arising in a maritime context are cognizable in federal district court. In *Amell* v. *United States*, 384 U.S. 158, this Court held that wage claims (exceeding $10,000) by government employees who were seamen were cognizable exclusively in the Court of Claims under the Tucker Act and not in federal district court under the Suits in Admiralty Act.

[10] See, *e.g.*, *Roberts* v. *United States*, 498 F. 2d 520 (C.A. 9); *De Bardeleben Marine Corp.* v. *United States*, 451 F. 2d 140, 144 (C.A. 5); *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F. 2d 167, 169 (C.A. 2); *T. J. Falgout Boats, Inc.* v. *United States*, 361 F. Supp. 838 (C.D. Cal.), affirmed, December 27, 1974, No. 73-1755 (C.A. 9); *Richmond Marine Panama, S.A.* v. *United States*, 350 F. Supp. 1210, 1212, 1219-1220 (S.D. N.Y.); *Utzinger* v. *United States*, 246 F. Supp. 1022 (S.D. Ohio); *Tankrederiet Gefion A/S* v. *United States*, 241 F. Supp. 83, 85 (E.D. Mich.); *Tebbs* v. *Baker-Whitely*

Similarly, the elimination of the phrase "employed as a merchant vessel" from 46 U.S.C. 742 guarantees that all maritime claims involving privately owned vessels operated for or by the United States will be heard in federal district court, regardless of whether the vessels are "merchant" vessels, and none will be relegated, as this Court feared in *Calmar* (see *supra*, pp. 12-13), to the Court of Claims. No such relegation problem existed prior to 1960 with respect to claims involving publicly owned vessels of the United States since, as this Court observed in *Calmar* (see *supra*, pp. 12-13), if the district court determined that such vessels were not "merchant" vessels the claims could still be heard in the same court under the Public Vessels Act.

Although as a result of the 1960 amendment deletion of the phrase "employed as a merchant vessel," the Suits in Admiralty Act (46 U.S.C. 742) could literally be read to authorize proceedings against

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Towing Co., 227 F. Supp. 656, 657-658 (D. Md.); *Beeler* v. *United States*, 224 F. Supp. 973, 975-976 (W.D. Pa.), reversed on other grounds, 338 F. 2d 687 (C.A. 3).

The court of appeals erroneously cites (App. A, *infra*, pp. 6a-7a) the *Ira S. Bushey, T. J. Falgout Boats*, and *Richmond Marine Panama* cases as authority for the proposition that the Suits in Admiralty Act now encompasses "all maritime claims against the United States, regardless of the type of vessel involved. Those cases held merely that all *maritime tort* claims previously cognizable against the United States under the Federal Tort Claims Act are now encompassed by the Suits in Admiralty Act as a result of the addition of the phrase "or if a private person or property were involved." None of these cases suggests that the Suits in Admiralty Act now encompasses claims cognizable under the Public Vessels Act.

"public vessels," the history of the amendment demonstrates that Congress did not intend to repeal the Public Vessels Act. As shown above, the 1960 amendment was designed solely to cure a jurisdictional problem arising from the quasi-admiralty jurisdiction of the Court of Claims—a problem which never existed in suits under Public Vessels Act since such suits were always cognizable in district courts.

2. Notwithstanding its recognition that repeal of the Public Vessels Act was "neither explicitly authorized nor perhaps contemplated by Congress" (App. A, *infra*, p. 7a), the court of appeals held, in effect, that the 1960 amendment to the Suits in Admiralty Act repealed the Public Vessels Act by implication. But it is well settled that repeal by implication is not favored, *e.g.*, *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357, especially where, as here, the purposes of the 1960 amendment was wholly unrelated to the policies of the Public Vessels Act.

The fact that the 1960 amendment can be literally read to encompass suits involving public vessels does not justify repeal of the Public Vessels Act by implication. Congress recognized that the provisions of the Public Vessels Act and the Suits in Admiralty Act are not entirely consistent (46 U.S.C. 782) and we submit that suits involving public vessels must satisfy the specific requirements of the Public Vessels Act.

This conclusion is based on the principle, reflected in this Court's decisions, that "[s]pecific terms pre-

vail over the general in the same or another statute which otherwise might be controlling." *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208; *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107. This principle applies even if the general terms became effective, as here, subsequent to the specific terms. *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758. Thus in *Preiser* v. *Rodriguez*, 411 U.S. 475, 489, this Court held that the specific terms of the federal habeas corpus statute (28 U.S.C. 2254) provided the exclusive remedy for state prisoners attacking the validity of the fact or length of their confinement "despite the literal applicability" of the broad general language of 42 U.S.C. 1983. The Court ruled that since the habeas corpus statute was "explicitly and historically designed" to cover the situation, its terms "must override the general terms of § 1983." 411 U.S. at 489, 490. The Public Vessels Act was "explicitly and historically designed" to cover claims, such as the instant one, involving publicly owned vessels of the United States, and suits presenting such claims must satisfy the requirements of the specific terms of the Public Vessels Act, even if they come within the literal terms of the Suits in Admiralty Act.

Respondent's suit, involving a claim of damages caused by a Navy destroyer, is covered by the Public Vessels Act, and the court of appeals erred in reversing the district court's judgment that respondent's failure to satisfy the reciprocity requirement of that Act was fatal to its claim.

3. Although this case involves only the reciprocity requirement of the Public Vessels Act, the decision of the court of appeals effectively repeals the Public Vessels Act in its entirety because the court held that suits involving public vessels need not be brought under the Public Vessels Act. Thus, the decision, if permitted to stand, will nullify several important congressional policies concerning suits involving public vessels.

For example, under 46 U.S.C. 784, officers and members of the crew of any publicly owned vessel of the United States may not be subpoenaed in connection with any suit authorized under the Public Vessels Act without the consent of the Secretary of the department or the person in control of the vessel at the time of the issuance of the subpoena. No such protection exists in suits authorized under the Suits in Admiralty Act.

More importantly, pursuant to 10 U.S.C. 7721-7730, the Secretary of the Navy, during time of war, may obtain a stay of any suit or proceedings brought under the Public Vessels Act when it appears that prosecution of the suit might interfere with naval operations. No such protection is available for suits brought under the Suits in Admiralty Act. The decision of the court of appeals nullifies the protection afforded by 10 U.S.C. 7721-7730 with potentially serious implications for the security of naval operations.[11]

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[11] The financial and administrative implications of the decision of the court of appeals are also substantial. The Suits in Admiralty Act permits interest on judgments to accrue

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.[12]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

ROBERT E. KOPP,
NEIL H. KOSLOWE,
Attorneys.

JANUARY 1975.

---

from the time suit is filed. 46 U.S.C. 745. The Public Vessels Act, on the other hand, does not allow interest to accrue prior to the time of judgment. If the suit here proceeded under the Suits in Admiralty Act and respondent prevailed, the difference in the interest award would be in the neighborhood of $250,000. The prospect of prejudgment interest in all admiralty judgments against the United States involving publicly owned vessels has a decided fiscal impact. Moreover, litigants aware of this difference would be disinclined to make use of the voluntary settlement provisions permitted under 10 U.S.C. 7622 and would instead file their suits as rapidly as possible.

In addition, the special venue requirements, 46 U.S.C. 782, of the Public Vessels Act would be nullified if the decision were permitted to stand.

[12] We believe the error committed by the court of appeals to be so plain that this Court may wish to grant the petition and summarily reverse the judgment of the court of appeals.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1189

[Filed June 24, 1974, , Clerk,
U. S. Court of Appeals]

UNITED CONTINENTAL TUNA CORPORATION,
a corporation, PLAINTIFF-APPELLANT,

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

No. 73-2417

JOHN A. KROH, SR., EDWARD L. WINN, SR., ALLEN T. PERRY, ROBERT E. G UNN, CORNELIUS ROACH, HERMAN SUTHERLAND, individuals, and H. O. PEET & CO., *Inc.*, a corporation, and STEPHEN, INC., a corporation, and UNITED CONTINENTAL TUNA CORPORATION, a corporation, PLAINTIFFS-APPELLANTS,

vs.

UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES.

Appeal from the United States District Court
from the Central District of California

Before: KOELSCH, HUFSTEDLER and TRASK, Circuit Judges

TRASK, Circuit Judge:

This case requires us to consider the interrelationship of the 1960 amendments to the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, as amended, September 13, 1960. Pub. L. 86-770, § 3, 74 Stat. 912; the Public Vessels Act, 46 U.S.C. §§ 781-790, and the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* It arises in the context of two suits brought by the owners of a fishing vessel who allege that the boat's sinking was caused by the U.S.S. Parsons, a naval destroyer and public vessel of the United States.

In late 1969, United Continental Tuna Corporation (Tuna Corporation) with funds furnished by American investors purchased a fishing vessel, the M.V. Orient and refitted it at considerable expense. Tuna Corporation was organized as a Philippine corporation to enable the boat to operate in the Republic of the Philippines. On its first voyage it was overhauled and hailed 70 miles outbound from San Pedro by the U.S.S. Parsons; a collision followed which resulted in the sinking of the Orient with total loss. The corporation filed an action in District Court against the United States to recover its loss under both the Suits in Admiralty to recover its loss under Public Vessels Act (PVA). The District Court granted the United States' motion for summary judgment and this appeal followed. During the pendency of that action the corporation was dissolved and its rights to recover for the loss of its sole asset were distributed to its shareholders. The shareholders com-

menced an alternative or back-up action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* (FTCA) alleging in substance that if they had no remedy for their cause of action under either SIA or PVA they had a remedy under FTCA. The two appeals were consolidated for argument and will be considered together here.

The basis upon which the motion for summary judgment was granted in the first action was that the appellant was a "foreign national" and therefore subject to section 5, the reciprocity provision of the PVA, 46 U.S.C. § 785.[1] That is, because the appellant was incorporated under the laws of the Republic of the Philippines, the court ruled that the appellant had to demonstrate that the Philippine government would consent to be sued if an action were brought against it by a United States citizen under like circumstances. Relatedly, the court concluded that the individual shareholders of Tuna Corporation had no greater rights derivatively than the corporation had originally. Since the appellant failed to demonstrate reciprocity, the court dismissed the suit on jurisdictional grounds. In so doing, the court implicitly rejected the argument that the appellant could maintain its action under the SIA *alone*, without reference to the PVA, and thereby avoid the application of the reciprocity requirement.

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[1] "785. Suits by nationals of foreign governments

"No suits may be brought under sections 781-790 of this title by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its court."

Prior to 1920, the United States claimed complete sovereign immunity from all claims arising out of collisions with its vessels. The first inroad upon this absolute immunity came in 1920 with the enactment of the Suits in Admiralty Act, 46 U.S.C. §§ 741-752. Section 742 of the SIA provided:

> "In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States . . . *provided that such vessel is employed as a merchant vessel* . . . ." (Emphasis supplied)

Thus, the government waived its immunity from liability for damages, but only in instances where United States "merchant" vessels or cargo were involved.

The second expansion occurred in 1925 with the passage of the Public Vessels Act. 46 U.S.C. §§ 781-790. This Act further waived sovereign immunity by permitting actions against the United States involving public vessels. It was in the PVA, however, that the reciprocity limitation previously discussed [2] was introduced. No such requirement was contained in the earlier SIA. There were other differences between the two admiralty statutes as originally enacted, including dissimilar venue provisions [3] and prejudgment interest allowances.[4] However, over the years, the courts have consistently construed the two maritime statutes together as constituting a complementary plan for the recovery of damages caused by government-owned vessels. Thus in *Calmar SS Corp.* v. *United States*, 345 U.S. 446, 451 (1953), the Supreme Court interpreted the two acts as "manifestations of a single larger purpose, jointly forming a rational system free of random omissions and exceptions." *See also Aliotti* v. *United States*, 221 F.2d 598, 602 (9th Cir. 1955); *Mejia* v. *United States*, 152 F.2d 686, 687 (5th Cir. 1945).

[2] See note 1 *supra*.

In 1960, however, this statutory scheme was disrupted by the adoption of an amendment to section 742 of the Suits in Admiralty Act. The amendment deleted the jurisdictional language in the first sentence of section 742 which had limited that Act to suits involving United States *merchant* vessels. In its place, a broad, new jurisdictional statement was substituted:

> "In cases where if such vessel were privately owned or operated, or if such cargo were private-

[3] Under the SIA, venue lies only in the District Court for the district in which the plaintiff resides or has his principal place of business, or in which the vessel or cargo charged with liability can be found. 46 U.S.C. § 742. The PVA, however, authorizes suit in any district court of the United States if the plaintiff neither resides nor has a principal place of business in the United States and the United States vessel is outside United States territorial waters. 46 U.S.C. § 782.

[4] See Richmond Marine Panama, S.A. v. United States, 350 F. Supp. 1210, 1219-21 (S.D.N.Y. 1972).

> ly owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . . ."

No mention of the PVA reciprocity provision appears in either amended section 742 or its legislative history. Indeed, the legislative history rather reveals that this amendment emerged as a hasty afterthought in a remedial effort that was primarily directed at eliminating the jurisdictional confusion between the admiralty statutes and the Tucker Act.[5] There is only the unelaborated observation that: "A substantial portion of the jurisdictional uncertainty in this area is attributable to confusion in establishing whether a vessel is a 'merchant vessel' or a "public vessel.' ". S.Rep. No. 1894, 86 Cong., 2d Sess., 1960 U.S. Code Cong. & Adm. News, 3583, 3586.

Notwithstanding the many ambiguities inherent in this legislative action, the majority of courts considering the 1960 amendments have interpreted the SIA as presently encompassing all maritime claims against the United States, regardless of the type of vessel involved. *See e.g. Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F.2d 167, 169 (2d Cir. 1968);

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[5] Both the SIA and the PVA contain a 2-year statute of limitations, while the Tucker Act (authorizing suit in the Court of Claims) has a 6-year limitations period. A mistake in selecting the correct statute and court frequently resulted in the loss of all relief. It was this fact which primarily motivated the legislative action which resulted in the 1960 amendments.

T. J. Falgout Boats, Inc. v. *United States*, 361 F. Supp. 838, 841-42 (C.D. Cal. 1972); *Richmond Marine Panama, S.A.* v. *United States*, 350 F. Supp. 1210, 1219-21 (S.D.N.Y. 1972); *but see J. W. Peterson Coal & Oil Co.* v. *United States*, 323 F. Supp. 1198 (N.D. Ill. 1970). Relatedly, in *Amell* v. *United States*, 384 U.S. 158, 164 (1966), the Supreme Court observed:

> "In 1960, Congress addressed itself to the jurisdictional overlap between the Tucker Act and the Suits in Admiralty Act . . . . Simultaneously, Congress abolished the distinction between public and merchant vessels, a matter which had sorely confused attorneys and had caused misfilings in the past . . . ."

Since the favored literal reading of amended section 742 would certainly support maintenance of the appellant's suit under SIA, we believe that the District Court erred when it dismissed the action as predicated upon that Act. Moreover, since section 785 of the PVA explicitly restricts the operation of the reciprocity requirement to that act alone, we see no reason to import the restriction to the SIA. *Cf. De Bardeleben Marine Corp.* v. *United States*, 451 F.2d 140, 145-146 (5th Cir. 1971). We acknowledge the government's concern that such a conclusion permits the PVA reciprocity provision to be circumvented in a manner neither explicitly authorized nor perhaps contemplated by Congress. However, we note that the more stringent venue requirements of the

SIA [6] may prohibit some foreign nationals from proceeding under the Act, and thus leave the PVA and its reciprocity clause some continuing efficacy.

Finally, we note that our conclusion here is consonant with the modern view which liberally construes waivers of governmental immunity. As Judge Brown observed in *Gulf Oil Corp.* v. *Panama Canal Co.*, 407 F.2d 24, 28 (5th Cir. 1969):

> "In the structure of the Suits in Admiralty Act, 46 U.S.C.A. § 741 et seq., the Public Vessels Act, 46 U.S.C.A. § 781 et seq., and the Federal Tort Claims Act, 28 U.S.C.A. § 1346(b) which expose the government in all of its sovereign glory to almost unlimited liabilities comparable to private parties, the approach is to construe the waiver sensibly, naturally, which means most of the time literally."

Since we conclude that the appellant's action is maintainable under the SIA, the necessary corollary is that this action is not cognizable under the FTCA. 28 U.S.C.A. § 2680(d).

We therefore reverse and remand the first action (Appeal No. 72-1189) for a trial on the merits, and affirm the dismissal of the appellant's second action (Appeal No. 73-2417).

---

[6] See note 3 *supra*.

APPENDIX B

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[Filed Oct. 18, 1971, Clerk, U. S. District Court, Central District of California, by R.T., Deputy, Entered Oct. 19, 1971, Clerk, U. S. District Court, Central District of California]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-81-ALS

UNITED CONTINENTAL TUNA CORPORATION,
a corporation, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

JUDGMENT

Defendant's Motion for Summary Judgment having come on for hearing on August 16 and October 4, 1971, and the Court having heard argument and reviewed the briefs and being fully advised in the premises and a decision having been duly rendered granting Defendant's Motion for Summary Judgment,

IT IS ORDERED AND ADJUDGED that Plaintiff's Complaint be and the same hereby is dismissed with prejudice, each party to bear its own costs.

DATED: Oct. 18, 1971

/s/ Albert Lee Stephens, Jr.
United States District Judge

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Central District of California, by R.T., Deputy]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-81-ALS

UNITED CONTINENTAL TUNA CORPORATION,
a corporation, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Plaintiff, United Continental Tuna Corporation, is a Philippine corporation and at all times material was the owner and operator of the fishing vessel M/V ORIENT.

2. Defendant United States of America, through its agency, Department of the Navy, was, at all times material, the owner and operator of the USS PARSONS (DDG-33), a public vessel of the United States.

3. Plaintiff, United Continental Tuna Corporation, brings this action against the United States alleging damages incurred as a result of a collision on December 11, 1969 between the M/V ORIENT and the USS PARSONS.

4. Plaintiff alleges jurisdiction under the Suits in Admiralty Act, 46 U.S.C. 741-752, and the Public Vessels Act, 46 U.S.C. 781-790.

5. In answering Plaintiff's Complaint and in its Motion for Summary Judgment, the United States alleges as an affirmative defense that this Court lacks jurisdiction of the cause in that Philippine law fails to meet the reciprocity requirements of Section 5 of the Public Vessels Act, 46 U.S.C. 785.

6. Plaintiff, United Continental Tuna Corporation, in an attempt to defeat the reciprocity requirements of the Public Vessels Act, alleges that said corporation has now been dissolved under Philippine law and that the shareholders of said corporation, over 99% of whom are alleged to be citizens of the

United States, should be substituted into this action, in place of United Continental Tuna Corporation, as the "real parties in interest".

CONCLUSIONS OF LAW

1. The Court's jurisdiction over Plaintiff's claim against Defendant, United States of America, is pursuant to the provisions of the Suits in Admiralty Act, 46 U.S.C. 741-752 and the Public Vessels Act, 46 U.S.C. 781-790.

2. Plaintiff's claim is subject to the reciprocity requirements of Section 5 of the Public Vessels Act, 46 U.S.C. 785. In order to meet the requirements of this section, Plaintiff has the burden of proving to this Court that the Philippine Government has consented to be sued in its courts by United States citizens "under similar circumstances," *i.e.*, on a cause of action arising from a collision between a Philippine public vessel and a vessel owned by a citizen of the United States.

3. The Philippine Government has not waived its sovereign immunity from suit for damages arising from collisions involving public vessels of the Philippine Government. *Luzon Stevedoring Corp.* v. *United States*, 1970 A.M.C. 1991 (D.C. 1970). (Not otherwise reported.) Philippine law accordingly does not meet the reciprocity requirements of the Public Vessels Act and the Court lacks jurisdiction of this cause pursuant to 46 U.S.C. 785.

4. Even if, as Plaintiff alleges, Plaintiff United Continental Tuna Corporation has been dissolved and its assets transferred to its shareholders, and further assuming that over 99% of said shareholders are citizens of the United States, Defendant's defense of lack of reciprocity under the Public Vessels Act would not be affected. Under such circumstances, if proven, all that would have been transferred to the aforementioned shareholders would have been the Plaintiff corporation's cause of action against the United States and the shareholders would have no greater rights in enforcing the corporate cause of

action than the corporation itself. Plaintiff's Complaint must accordingly be dismissed.

DATED: Oct. 18, 1971

/s/ Albert Lee Stephens, Jr.
United States District Judge

PRESENTED BY:

ROBERT L. MEYER
United States Attorney
FREDERICK M. BROSIO, JR.
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Chief of Civil Division

/s/ Clarke A. Knicely
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/s/ Paul Gary Sterling
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APPENDIX C

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

Re: No. 72-1189 UNITED CONTINENTAL TUNA CORPORATION *vs.* USA

73-2417 JOHN A. KROH, SR. ETC ET AL *vs.* USA

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 6-24-74 reversing and remanding appeal No. 72-1189 affirming etc appeal No. 73-2417 the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk
U. S. Court of Appeals

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 72-1189

UNITED CONTINENTAL TUNA CORPORATION,
a corporation, PLAINTIFF-APPELLANT

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE
Before: KOELSCH, HUFSTEDLER and TRASK

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

[Filed Aug. 21, 1974, Clerk, U. S. Court of Appeals]

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 566702 91

Supreme Court, U. S.
FILED
MAY 1 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-869

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

UNITED CONTINENTAL TUNA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED JANUARY 15, 1975
CERTIORARI GRANTED MARCH 17, 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-869

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

UNITED CONTINENTAL TUNA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX TO APPENDIX

	Page
Docket entries	1
Complaint	5
Answer	8
Motion for substitution of plaintiffs and leave to file amended complaint	11
Affidavit of counsel in support of motion	12
Motion for summary judgment	14-15
Order of October 18, 1971	16-17
Order allowing certiorari	18

UNITED STATES DISTRICT COURT

Civil Docket 70-81-ALS

Jury demand date:

UNITED CONTINENTAL TUNA CORPORATION, a corporation,
PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

Complt. for Damages Resulting from Ship Collision

For plaintiff:

Lillick, McHose, Wheat, Adams & Charles
Gordon K. Wright
Francis J. MacLaughlin
611 West Sixth St.
Los Angeles, Calif. 90017
623-1561

Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 5 mailed	Clerk	1/14/70	Lillick, etc.	15—	1-16
J.S. 6 mailed	Marshal	10/13/71	40479	5—	12-16
Basis of Action:	Docket fee				
	Witness fees				
Action arose at:	Depositions				

DATE	PROCEEDINGS
1-13-70	Fld Complt for Damages resulting from Ship Collision. Issd summs—Md JS-5.
1-27-70	Fld summs—retd svd 1/20/70
3-24-70	Fld deft ANSWER.
9-18-70	Ord case set for P/T 12/7/70, 10AM.

DATE	PROCEEDINGS
12- 3-70	Fld stip & ord (ALS) contg P/T conf now set for 12/7/70, retable 3/8/71, 10AM.
	Ent in error see 71-87-CC
2-25-71	Fld stip & ord (ALS) contg P/T conf now set for 3/8/71, retable 5/10/71, 9:30AM.
5-10-71	Fld stip & ord (ALS) contg P/T conf retable 6/14/71, at 9:30AM.
5-25-71	Fld plft not of mot for substitution of plft's and for leave to file amended complt retable 6/21/71, at 10am, memoranda of pts & auths & affid of cnsl in support thereof.
6- 1-71	Fld U.S.A. not of mot for summy judgtm retable 6/21/71, at 10am, memo of pts & auths in support of deft's mot for summy judgmt; Fld U.S.A. memo in oppos to mot for substitution of plft's & for leave to file amended complt; LODGED proposed judgmt; LODGED proposed ord granting summy judgmt.
6-21-71	Fld stip & ord (ALS) for contg of hrg on mots & P/T conf retable for mots 8/2/71, & P/T 8/16/71, at 9:30A.M.
7-26-71	Fld plft memo of pts & auths in oppos to deft's mot for summy judgmt & affid of cnsl in support thereof.
8- 3-71	LODGED proposed amended complt for damages resulting from Ship Collision.
*8- 2-71	The Motion of plf for substitution and for leave to file amended complt and Motion of defendant for summary judgment are hereby continued to August 16, 1971 in order to permit plaintiff to lodge proposed amended complaint. Counsel may file additional memoranda, including points and authorities discussing the effect of the dissolution of the Phillipine corporation on this court's juris-

DATE	PROCEEDINGS
	diction. Counsel should treat the dissolution herein undertaken, the conflict of laws issues raised, and the effect of the attempted transfer of the claim from the corporation to the shareholders after dissolution. The motions will be considered August 16, and will be determined upon the pleadings and papers filed without oral argument. Local Rule 3(d). Rules of the Central District of California. If oral argument is deemed necessary, a hearing date will be hereafter set.
8-12-71	Ordered Case continued for hearing on Pretrial, Motion of plaintiff for substitution of plaintiff and for leave to file an amended complaint, and motion of USA for summary judgment to October 4, 1971, 9:30AM
10- 4-71	Ordered motion of plaintiff for substitution of pltf & for leave to file an amended complaint. Ord said mot denied. Ord mot of U.S.A. for summy judgmt is granted.
10-15-71	LODGED proposed ord denying plft's mot for substi of plft's & for leave to file amended complt & granting deft's mot for summy judgmt; LODGED propsed findgs of fact & conclus of law; LODGED proposed judgmt.
10-18-71	Fld order dnyg pltf's mot for sub of pltf's for leave to file amnd cmplt and granting deft's mot for summy judgmt: Fld finds of fact & concl of law: Fld jdgmnt & ord thereon dismissing pltf's cmplt w/prej & ea prty bear its own costs. (Ent 10/19/71 ntfd prtys) JS-6
12-15-71	Fld Plf's NOTICE OF APPEAL. Issd copies to (ALS) & R.E. & mld copy to Paul Gary Sterling, U.S. Dept. of Justice. Fld Plf's Designation of Record on Appeal. Fld Bond for Costs on Appeal in the sum of $250.00.

DATE	PROCEEDINGS
1- 7-72	Fld deft U.S.A. designation of record on appeal.
1-14-72	Issd & fwd to C/A Orig Rec on Appeal.
8-29-73	Place bond of National Surety Corp (no number) in file. mn
8- 8-74	Rec'd Frm C/A cc order Affirming in 72-1456 and Reversing Remanding in 70-81 (cy to CJ) cw
9- 9-74	Fld note of hrg on flg & spreading judgmt of C/A retnble 9/30/74, 9:30am. sa
9-11-74	Rec'd fr C/A orig rec on appeal. Mld recpt.
9-30-74	MIN ORD: Hrg hld, Ord jdgmt of C/A reversing & remanding jdgmt of USDC fld & spread. Ord case set for P/T 11-4-74, 9:30 AM. (Ent 10-8-74)
10-25-74	Fld deft's PT status memo.
10-29-74	Fld pltf's stmt for PTC.
11- 4-74	MIN ORD: Ord case cont'd for P/T retnble 11-25-74, 9:30 AM.
11-25-74	MIN ORD: Ord case cont'd for P/T retnble 1-6-75, 9:30 AM.
1- 6-75	Rec'd fr C/A cc of ord of C/A staying USDC prcdgs until fur ord of C/A (cy to Ct Clerk CJ)
1- 6-75	MIN ORD: Purs to ord of USCA all fur procs in case ord stayed until fur ord
3-18-75	md reopening JS 5 card

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IN THE DISTRICT COURT OF THE UNITED STATES
CENTRAL DISTRICT OF CALIFORNIA

No. 70-81-ALS

[Filed 1-14-70]

UNITED CONTINENTAL TUNA CORPORATION, a corporation, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

COMPLAINT FOR DAMAGES RESULTING FROM SHIP COLLISION

Plaintiff, UNITED CONTINENTAL TUNA CORPORATION, for cause of action against the defendant, alleges as follows:

I

This is an admiralty and maritime claim within the meaning of Federal Rules of Civil Procedure, Rule 9(h).

II

Plaintiff is a Philippine corporation and at all times relevant hereto, was the owner and operator of a fishing vessel known as the M/V ORIENT.

III

Defendant, United States of America, at all times relevant hereto, owned and operated a naval destroyer known as the USS PARSONS.

IV

Plaintiff brings this action against defendant under the Suits In Admiralty Act, 46 USCA 741-752, and the Public Vessels Act, 46 USCA 781-790.

V

Citizens of the United States have the legal right, under Philippine law, to file an action in Philippine courts against Philippine citizens to recover for damages resulting from ship collisions. In view of the rights accorded United States citizens under Philippine law, plaintiff is entitled to reciprocal rights and is entitled to sue the defendant herein by virtue of the provisions of 46 USCA 785.

VI

On or about December 11, 1969, at approximately 0500 hours, the M/V ORIENT and the USS PARSONS came into collision on navigable waters near San Nicholas Island off the Coast of Southern California; said location being within the Central District of California or closest to that District. The USS PARSONS is within the District, or expected to be within the District, during the pendency of this action.

VII

The collision was caused by the sole fault of the USS PARSONS in that:

1) The USS PARSONS was manned with incompetent and unseaworthy personnel who negligently and incompetently directed the course and speed of the USS PARSONS.

2) The USS PARSONS failed to sound proper whistle signals.

3) The USS PARSONS failed to have on deck a competent lookout.

4) The USS PARSONS was negligently navigated in other manners now unknown to plaintiff; and leave to amend to state further particulars will be requested.

VIII

As a result of the collision the M/V ORIENT sank at the spot of the collision. The loss thereby sustained by plaintiff herein is approximately $1,000,000.

WHEREFORE, plaintiff prays:

1) That plaintiff have judgment against defendant in the sum of $1,000,000.

2) That plaintiff recover its costs herein.

3) That plaintiff receive whatever other relief may to the court seem just.

LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES
GORDON K. WRIGHT
FRANCIS J. MACLAUGHIN

By FRANCIS J. MACLAUGHLIN
Francis J. MacLaughlin
Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-81-ALS

[Filed Mar. 24, 1970, Clerk, U.S. District Court, Central District of California. By ———, Deputy.]

UNITED CONTINENTAL TUNA CORPORATION,
a corporation, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

ANSWER

For Answer to Plaintiff's Complaint Defendant United States of America admits, and denies and alleges on information and belief as follows:

1. Paragraph I concerns matters of law for the attention of the Court and requires no Answer.

2. Defendant is without information sufficient to form a belief as to the truth of the allegations of Paragraph II.

3. Admits.

4. Paragraph IV concerns matters of law for the attention of the Court and requires no Answer.

5. Defendant denies that the United States has consented to be sued in this matter by virtue of the provisions of 46 U.S.C. 785, or any other statute. The remaining allegations of Paragraph V concern matters of law for determination by the Court and require no Answer.

6. Admits.

7. Denies the allegations of Paragraph VII and alleges that the collision referred to was caused solely by the negligence and unseaworthiness of the M/V ORIENT in particulars not presently known to Defendant. Leave is requested to amend this Answer to set forth the specific faults of the MV/ORIENT when they become known.

8. Defendant has insufficient knowledge to form a belief as to the truth of the allegations of Paragraph VIII and therefore denies the same.

First Affirmative Defense

Plaintiff has failed to allege that a citizen of the United States may maintain an action against the Philippine government in the Philippine courts for collision damages, as required by Section 5 of the Public Vessels Act, 46 U.S.C. 785. Accordingly, Plaintiff has failed to state a claim for which relief may be granted and this Court has no jurisdiction over Plaintiff's alleged cause of action.

Second Affirmative Defense

A citizen of the United States is not permitted under Philippine law to maintain an action against the Philippine government, in the Philippine courts, for collision damages under circumstances similar to those alleged in Plaintiff's Complaint. In accordance with Section 5 of the Public Vessels Act, 46 U.S.C. 785, therefore, the United States has not waived its sovereign immunity

and this Court has no jurisdiction over Plaintiff's alleged cause of action.

WHEREFORE, Defendant United States of America prays that the Complaint be dismissed with costs and that Defendant have such other and further relief as may be just in the premises.

WM. MATTHEW BYRNE
United States Attorney

FREDERICK M. BROSIO
Assistant United States Attorney
Chief of Civil Division

/s/ Clarke A. Knicely
CLARKE A. KNICELY
Assistant United States Attorney

JOHN F. MEADOWS
Attorney in Charge, West Coast Office
Admiralty and Shipping Section

/s/ Paul Gary Sterling
PAUL GARY STERLING, Attorney
Admiralty and Shipping Section
U.S. Department of Justice
Attorneys for Defendant
United States of America

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above Answer was mailed this date by depositing in the United States mail, postage prepaid, addressed to:

Lillick, McHose, Wheat, Adams & Charles
Att: Gordon K. Wright and
Francis J. MacLaughlin, Esq.
611 West Sixth Street
Los Angeles, California 90017
Attorneys for Plaintiff

DATED: March 20, 1970

/s/ Paul Gary Sterling
PAUL GARY STERLING

LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES
FRANCIS J. MACLAUGHLIN
611 West Sixth St., 28th Floor
Los Angeles, California 90017
623-1561
Attorneys for Plaintiff

IN THE DISTRICT COURT OF THE
UNITED STATES
CENTRAL DISTRICT OF CALIFORNIA

No. 70 81 ALS

UNITED CONTINENTAL TUNA CORPORATION,
a corporation, PLAINTIFF

vs.

UNITED STATES OF AMERICA, DEFENDANT

NOTICE OF MOTION FOR SUBSTITUTION OF PLAINTIFFS AND FOR LEAVE TO FILE AMENDED COMPLAINT, MEMORANDA OF POINTS AND AUTHORITIES AND AFFIDAVIT OF COUNSEL IN SUPPORT THEREOF

TO DEFENDANT UNITED STATES OF AMERICA AND ITS COUNSEL:

Please Take Notice that at 10:00 A.M. on June 21, 1971 in the above entitled court John A. Kroh, Sr. and other shareholders of United Continental Tuna Corporation will move the court for an order substituting their names as parties plaintiff in place of United Continental Tuna Corporation, and for leave to file an amended complaint reflecting said substitution. The basis for said motion is that United Continental Tuna Corporation, a corporation, is dissolved and that its shareholders who

seek leave to be substituted herein are now and always have been the real parties in interest. Said motion will be based upon this notice, the memoranda of points and authorities and affidavit of counsel attached hereto and the pleadings in this action.

DATED: May 21, 1971

LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES
FRANCIS J. MACLAUGHLIN

By Francis J. MacLaughlin
Attorneys for Plaintiff

AFFIDAVIT OF COUNSEL

I, Francis J. MacLaughlin do swear that the following matters are true to the best of my knowledge and belief.

This action was filed initially by United Continental Tuna Corporation, a Philippine corporation, which was at all times relevant hereto 99% owned by shareholders who are United States citizens and reside in the United States. Since the ship collision referred to in the complaint occurred on December 11, 1969, United Continental Tuna Corporation has been an inactive corporation and is now being dissolved in Manila in accordance with Philippine law. I am advised by Manila counsel that the proper documents to effect the dissolution have been filed with the appropriate Philippine authority and that one remaining minor formality concerning the corporation's balance sheet will be completed very shortly. I am advised and believe that the dissolution will be completed within several days and will be effective at the time this motion is noticed for hearing.

The American shareholders who seek leave to be substituted into this action are now and always have been the real parties in interest and the parties for whose

benefit this action was originally commenced. The names and citizenship of the shareholders are as follows:

John A. Kroh, Sr., a citizen of Missouri

Edward L. Winn, Sr., a citizen of Missouri

Allen T. Perry, a citizen of Missouri

Robert E. Gunn, a citizen of Missouri

Cornelius Roach, a citizen of Missouri

Herman Sutherland, a citizen of Missouri

H. O. Peet & Co., Inc., a corporation, organized and existing under the laws of Missouri

Stephens, Inc., a corporation, organized and existing under the laws of Arkansas

The above-named shareholders owned 99.5% of the stock of United Continental Tuna Corporation prior to its dissolution. The remaining ½ of 1% was owned by several former employees of United Continental Tuna Corporation who do not wish to be joined in this litigation and have granted to the other shareholders whatever interest they may have in the proceeds of this litigation.

FRANCIS J. MACLAUGHIN
Francis J. MacLaughlin

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

Subscribed and sworn to before be this 21st day of May 1971

/s/ Joanne M. FitzGerald

[SEAL]

Official Seal
Joanne M. FitzGerald
Notary Public—California
Principal Office in
Los Angeles County
My Commission Expires Dec. 10, 1973

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-81-ALS

[Filed Jun. 1, 1971, Clerk, U.S. District Court, Central District of California. By ———— Deputy]

UNITED CONTINENTAL TUNA CORPORATION, a corporation, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

NOTICE OF MOTION FOR SUMMARY JUDGMENT

TO LILLICK, McHOSE, WHEAT, ADAMS & CHARLES, ATTENTION FRANCIS J. MacLAUGHLIN, ATTORNEYS FOR PLAINTIFF:

PLEASE TAKE NOTICE that at 10:00 a.m. on June 21, 1971, in the above-entitled court, or as soon thereafter as counsel can be heard, Defendant United States of America will move for an order dismissing Plaintiff's Complaint upon the ground that Philippine law does not in fact meet the reciprocity requirements of the Public Vessels Act, 46 U.S.C. 785. This Motion is based upon the pleadings in this action and the accompanying Memorandum of Points and Authorities.

DATED: May 28, 1971.

ROBERT L. MEYER
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FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief of Civil Division

/s/ Clarke A. Knicely
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 70-81-ALS

[Filed Oct. 18, 1971, Clerk, U.S. District Court, Central District of California. By ———Deputy]

UNITED CONTINENTAL TUNA CORPORATION, a corporation, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

ORDER DENYING PLAINTIFF'S MOTION FOR SUBSTITUTION OF PLAINTIFFS AND FOR LEAVE TO FILE AMENDED COMPLAINT

AND

GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff's Motion for Substitution of Plaintiffs and for Leave to File Amended Complaint and Defendant's Motion for Summary Judgment having come on to be heard on August 16 and October 4, 1971, and the Court having considered the memoranda of points and authorities on file herein and having heard argument of counsel, and the Court having found that there are no genuine issues of fact in controversy,

IT IS HEREBY ORDERED that Plaintiff's Motion for Substitution of Plaintiffs and for Leave to File Amended Complaint be and the same hereby is denied and that Defendant's Motion for Summary Judgment be and the same hereby is granted.

DATED: Oct. 18, 1971

/s/ Albert L. Stephens, Jr.
United States District Judge

SUPREME COURT OF THE UNITED STATES

No. 74-869

UNITED STATES, PETITIONER

v.

UNITED CONTINENTAL TUNA CORPORATION

ORDER ALLOWING CERTIORARI

Filed March 17, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

Mr. Justice Douglas took no part in the consideration or decision of this petition.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 573836 153

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of February, A.D. 1975.

Supreme Court, U. S.
FILED
FEB 19 1975
MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-869

UNITED STATES OF AMERICA,
Petitioner,

vs.

UNITED CONTINENTAL TUNA CORPORATION,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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SUBJECT INDEX

Page

Statement 1

I.

This Petition for a Writ of Certiorari Should Be Denied for the Reason That the Court of Appeals' Decision Is Plainly Correct 2

II.

This Petition for a Writ of Certiorari Should Be Denied for the Reason That the Case Does Not Meet the Criteria for Review Set Forth in Supreme Court Rule 19 5

III.

Tuna Corporation Does Not Waive Other Arguments on the Basis of Which It Believes the Courts of Appeals Could Have Reached the Same Result 7

IV.

Conclusion 8

TABLE OF AUTHORITIES CITED

Cases	Page
Amell v. United States, 384 U.S. 158 (1966) ..2, 3,	6
Gulf Oil Corp. v. Panama Canal Co., 407 F. 2d 24 (5th Cir. 1969)	3
Ira S. Bushey & Sons, Inc. v. United States, 398 F. 2d 167 (2nd Cir. 1968)	5
United Philippine Lines, Inc. v. Submarine USS DANIEL BOONE, 475 F. 2d 478 (5th Cir. 1973) 4,	6
United States v. Philippine National Bank, 292 F. 2d 743 (D.C. Cir. 1961)	4
United States v. Yellow Cab Co., 340 U.S. 543 (1951) 3,	4
Miscellaneous	
Senate Report No. 1894, 86 Cong., 2d Sess., 1960 U.S. Code Cong. & Adm. News, pp. 3583, 3586	2
Rules	
Rules of the Supreme Court, Rule 19 5,	7
Statutes	
Philippine Civil Code, Sec. 2176	4
Philippine Civil Code, Sec. 2180	4
United States Code, Title 28, Sec. 1346(b)	2
United States Code, Title 28, Sec. 2671	2
United States Code, Title 46, Secs. 741-752	2
United States Code, Title 46, Secs. 781-790	2

IN THE

Supreme Court of the United States

October Term, 1974
No. 74-869

UNITED STATES OF AMERICA,
Petitioner,

vs.

UNITED CONTINENTAL TUNA CORPORATION,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

Statement.

United Continental Tuna Corporation (Tuna Corporation), with funds furnished by United States citizen-investors, purchased a fishing vessel, the M.V. ORIENT, in San Pedro, California, and then refitted it at considerable expense. Tuna Corporation was organized as a Philippine corporation to enable the boat to operate in the Republic of the Philippines. On its maiden voyage, outbound for the Philippines, it was run down and sunk by a U.S. Navy destroyer, the U.S.S. PARSONS, at a point 70 miles from San Pedro. Tuna Corporation alleges the casualty was caused by negligent operation of the destroyer and that its financial loss exceeded one million dollars. Tuna Corporation commenced these actions in the District Court against the

United States under the Suits in Admiralty Act (SIA) 46 U.S.C. 741-752, as amended September 13, 1960, the Public Vessels Act (PVA) 46 U.S.C 781-790, and the Federal Tort Claims Act (FTCA) 28 U.S.C. 1346 (b), 2671, *et seq*. The actions were dismissed by the District Court, but that dismissal was reversed by the Court of Appeals which held an action will lie under the SIA as amended. The Government petitions now for review of that decision.

I.

This Petition for a Writ of Certiorari Should Be Denied for the Reason That the Court of Appeals' Decision Is Plainly Correct.

The Court of Appeals' decision that Tuna Corporation can prosecute its claim against the United States under the SIA, as amended in 1960, is plainly correct. Prior to 1960 coverage of the SIA was limited to damage caused by "merchant" vessels, but in 1960 Congress removed this limitation from the SIA. The legislative history discloses that Congress did this because it was concerned, among other things, about past confusion between "public" and "merchant" vessels and wished to abolish this technical distinction. S. Rep. No. 1894, 86 Cong., 2d Sess., 1960 U.S. Code Cong. & Adm. News, 3583, 3586. As this Court noted in *Amell v. United States*, 384 U.S. 158, 164 (1966):

> "In 1960, Congress addressed itself to the jurisdictional overlap between the Tucker Act and the Suits in Admiralty Act . . . *Simultaneously Congress abolished the distinction between public and merchant vessels, a matter which had sorely confused attorneys, and had caused misfilings in the past* . . ." (Italics added).

The SIA as amended now covers damage caused by any and all types of Government vessels, without limitation, and the pre-1960 distinction between public and merchant vessels no longer exists. If there were any doubt as to whether this distinction has been abolished, which there is not, that doubt would be resolved against the Government since the SIA, like the FTCA, is liberally construed in favor of claimants who have been negligently damaged by Government employees. *Gulf Oil Corp. v. Panama Canal Co.*, 407 F. 2d 24, 28 (5th Cir. 1969); *United States v. Yellow Cab Co.*, 340 U.S. 543, 552 (1951). In view of the foregoing, the Court of Appeals' ruling was plainly correct.

The Government seeks herein to resurrect the pre-1960 distinction under the SIA between public and merchant vessels and thereby restore to life the technical distinction Congress expressly intended in 1960 to abolish. The Government argument is without merit because it ignores the plain language used in the amended SIA, its legislative history, and the Court's clear pronouncement in *Amell v. United States, supra,* that the distinction has been abolished, and, last but not least, the rule of construction favoring liberal interpretation of the SIA in favor of claimants.

The Government's motive in attempting to restore to life a distinction long since abolished is transparent. The Government seeks to resurrect this distinction for the reason that if Tuna Corporation cannot proceed under the SIA, and instead must proceed under the old Public Vessels Act (PVA), then Tuna Corporation's claim, according to the Government, will be barred due to the PVA reciprocity clause. In short, the Government urges an interpretation which, according to the

Government, would permit it to negligently sink and destroy Tuna Corporation's vessel with total impunity.

The Government's argument is not only lacking in legal merit, for the reasons set forth in the Court of Appeals' decision, but would cause a shockingly inequitable and unjust result in this litigation. It should be recalled that the Government has the right, and frequently exercises it, to sue Philippine citizens. Such actions are brought by the Government in this country[1] and can be brought in the Philippine courts.[2] In other words, the Government claims and exercises the right to sue Philippine shipowners for the damage they cause to United States vessels, but the Government now seeks to establish a rule of law which would prevent reciprocal actions by Philippine citizens for damage caused by United States vessels. The Government's position is patently unfair. As this Court observed in *United States v. Yellow Cab, supra,* 552, in rejecting a similar Government argument relating to the Federal Tort Claims Act, "It is fair that this should work both ways". While there may be reasons for denying foreign sovereigns standing to sue, when they cannot be sued, there is no reason for denying this right to individual foreign citizens who are subject to suit by the Government both here and in their own country.

Ths Government's other arguments are likewise unjust and equally lacking in legal merit. The "specific" vs. "general" doctrine of statutory construction (Govt. Br. 17-18) was not raised by the Government in either the District Court or Court of Appeals and should not

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[1]*United Philippine Lines, Inc. v. Submarine USS DANIEL BOONE,* 475 F. 2d 478 (5th Cir. 1973); *United States v. Philippine National Bank,* 292 F. 2d 743 (D.C. Cir. 1961).

[2]Philippine Civil Code, Sections 2176, 2180.

be considered now for the first time. Moreover, that argument is no answer to the legislative history and language used in the 1960 amendment to the SIA, which plainly demonstrate a desire by Congress to abolish the pre-1960 distinction between public and merchant vessels, and to place claims for damage caused by all Government vessels within the parameters of the SIA. Similarly, the Government argument is no answer to the strongly entrenched policy of liberally interpreting claims statutes and of not favoring claims of sovereign immunity. The repeal by implication argument, which was raised below, fails for the same reasons.

II.

This Petition for a Writ of Certiorari Should Be Denied for the Reason That the Case Does Not Meet the Criteria for Review Set Forth in Supreme Court Rule 19.

Review by the Supreme Court is not a matter of right and is not granted except where, in sound judicial discretion, there are special and important reasons for review. The reasons usually justifying review are set forth in Supreme Court Rule 19, and none of those reasons are pertinent to this case.

There is no conflict between the Courts of Appeals on the issue herein raised. The Ninth Circuit's decision is not only in accord with the plain, unequivocal language of that statute, but, also, is in agreement with the only other decisions from other circuits on the point. In *Ira S. Bushey & Sons, Inc. v. United States,* 398 F. 2d 167, 169 (2nd Cir. 1968), it was held that damage caused by a Coast Guard vessel (which would have been a "public" vessel under the pre-1960 distinction between public and merchant vessels) would be

cognizable under the SIA as amended. In *United Philippine Lines, Inc. v. Submarine USS DANIEL BOONE, supra*, 480, which involved damage to a Philippine vessel caused by a U.S. Navy submarine, the Court specifically did not decide the issue but noted that a literal interpretation of the SIA, as amended, would encompass damage caused by vessels formerly classified as public, and such interpretation of the SIA is usually required. So far as is known by Tuna Corporation, no other Circuit has expressed an opinion upon the point of law herein involved and, plainly, there is no disagreement between the Circuits which have considered it.

The issue raised can hardly be regarded as an important question of federal law which should be settled by this Court, aside from what has already been expressed in *Amell v. United States, supra,* as is evidenced by the paucity of cases in which the issue has arisen and the small number of potential claimants it affects. The Government suggestion that this ruling will cripple the national war effort in time of hostilities, because Government crew members can be subpoenaed under the SIA to give testimony (Govt. Br. 19) is lacking in merit. The Government overlooks that our District Courts have broad discretion under the Federal Rules of Civil Procedure to regulate the taking of testimony and, plainly, our District Courts will not permit claimants to secure the testimony of Government personnel under circumstances which would interfere with or cripple national war efforts, as the Government allegedly

fears. The Government's other suggestion (Govt. Br. footnote 11) that the allowance of prejudgment interest under the SIA, in this and similar cases, will cause the Government "substantial" financial problems is likewise without merit in view of the small number of claimants affected and, especially so, because the District Courts will not award prejudgment interest except where it is just to do so.

Nor are any of the other considerations for review set forth in Rule 19 here present. State and territorial questions are not here involved and it cannot be asserted that the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III.

Tuna Corporation Does Not Waive Other Arguments on the Basis of Which It Believes the Courts of Appeals Could Have Reached the Same Result.

Tuna Corporation wishes to emphasize that it is not waiving other arguments it presented to the Court of Appeals on the basis of which the same result could have been reached. If the Government's petitioner for a writ of certiorari is granted, Tuna Corporation will wish to renew its alternative arguments that: (1) Tuna Corporation should be treated as a domestic shipowner rather than as an alien, and can sue under the PVA; (2) Tuna Corporation, even if treated as an alien, can sue under the PVA because the "reciprocity" clause is void as an unconstitutional denial of equal protection; and (3) if Tuna Corporation cannot recover under the SIA or PVA, then it is entitled to sue under the FTCA.

IV.

Conclusion.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

GORDON K. WRIGHT,
Attorney for Respondent.

LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES,
Of Counsel.

Supreme Court, U. S.
FILED
MAY 2 1975
MICHAEL RODAK, JR., CLERK

No. 74-869

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED CONTINENTAL TUNA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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IRVING JAFFE,
Acting Assistant Attorney General,

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	5
Summary of argument	6
Argument	8
Suits involving public vessels of the United States must be brought under the Public Vessels Act, notwithstanding the 1960 amendment to the Suits In Admiralty Act.	8
A. The legislative history of the 1960 amendment reveals no congressional intent to modify the Public Vessels Act.	9
B. The construction of the 1960 amendment by the court of appeals is contrary to settled principles of statutory interpretation.	20
C. The decision of the court of appeals nullifies important congressional policies	22
Conclusion	24

CITATIONS

Cases: Page

Aliotti v. *United States*, 221 F.2d 598 12
Amell v. *United States*, 384 U.S. 153 ..... 8, 16
American Stevedores v. *Porello*, 330 U.S. 446 8
Beeler v. *United States*, 224 F. Supp. 973, reversed on other grounds, 338 F.2d 687 16
Bulova Watch Co. v. *United States*, 365 U.S. 753 21
Calmar Steamship Corp. v. *United States*, 345 U.S. 446 ..... 12, 13, 17
Canadian Aviator, Ltd. v. *United States*, 324 U.S. 215 8
Compania Ithaca De Vapores, S.A. v. *United States*, 124 F. Supp. 627 12
D. Ginsberg & Sons, Inc. v. *Popkin*, 285 U.S. 204 21
De Bardeleben Marine Corp. v. *United States*, 451 F.2d 140 16
Eastern Steamship Lines v. *United States*, 187 F.2d 956 12
Geo. W. Rogers Const. Corp. v. *United States*, 118 F. Supp 927 13
Ira S. Bushey & Sons, Inc. v. *United States*, 398 F.2d 167 ..... 17, 18
Johansen v. *United States*, 343 U.S. 427 8
Lake Monroe, The, 250 U.S. 246 9
Lykes Bros. Steamship Co. v. *United States*, 124 F. Supp. 622 12
MacEvoy Co. v. *United States*, 322 U.S. 102 21
New York Trust Co. v. *Eisner*, 256 U.S. 345 9

Cases—Continued Page

Polar Compania De Navegacion v. *United States*, 124 F. Supp. 625 12
Preiser v. *Rodriguez*, 411 U.S. 475 ..... 7, 21
Richmond Marine Panama, S.A. v. *United States*, 350 F. Supp. 1210 ..... 18, 19
Roberts v. *United States*, 498 F.2d 520, certiorari denied, December 15, 1974 (No. 74-368) 16
Silver v. *New York Stock Exchange*, 373 U.S. 341 ..... 7, 20
Sinclair Refining Co. v. *United States*, 124 F. Supp. 628 12
Somerset Seafood Co. v. *United States*, 193 F.2d 631 11
T. J. Falgout Boats, Inc. v. *United States*, 361 F. Supp. 838, affirmed, 508 F.2d 855, petition for a writ of certiorari filed March 22, 1975 (No. 74-1215) 16, 17, 18-19
Tankrederiet Gefion A/S v. *United States*, 241 F. Supp. 83 16
Tebbs v. *Baker-Whitely Towing Co.*, 227 F. Supp. 656 16
Utzinger v. *United States*, 246 F. Supp. 1022 16
Waterman Steamship Corp. v. *United States*, 124 F. Supp. 634 12
Wessel, Duval & Co. v. *United States*, 124 F. Supp. 636 ..... 12, 13

Statutes:

Federal Tort Claims Act, 28 U.S.C. 1346 (b), *et seq.* 11

Statutes—Continued — Page

Public Vessels Act, 43 Stat. 1112, as amended, 46 U.S.C. 781, *et seq.* 2, 5, 6
Section 781 ..... 4, 6, 10
Section 782 ..... 4, 6, 10, 13, 21, 23
Section 784 ..... 7, 10, 22
Section 785 ..... 5, 7, 11

Shipping Act, 39 Stat. 728, 46 U.S.C. 801, *et seq.* 9

Section 808 9

Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 741, *et seq.* 2, 5

Section 741 ..... 2, 6, 9
Section 742 (1958 ed.) 10
Section 742 ..... 3, 6, 15, 16
Section 745 ..... 13, 23

Tucker Act:

28 U.S.C. 1346(a)(2) 11
28 U.S.C. 1491 11

74 Stat. 912 ..... 2, 15
10 U.S.C. 7721-7730 ..... 7, 22, 23
28 U.S.C. 1500 13
28 U.S.C. 2254 21
28 U.S.C. 2401(a) 13
42 U.S.C. 1983 21

Miscellaneous:

104 Cong. Rec. 14433-14434 (1958) 14
H.R. 3046, 85th Cong., 2d Sess. (1958) 14
H.R. 5396, 86th Cong., 1st Sess. (1959) 14
S. Rep. No. 1894, 86th Cong., 2d Sess. (1960) 15

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-869

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED CONTINENTAL TUNA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-8a) is reported at 499 F.2d 774. The findings of fact and conclusions of law and the judgment of the district court (Pet. App. B, pp. 9a-15a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1974 (Pet. App. C, p. 16a), and the court

of appeals denied a timely petition for rehearing on August 21, 1974 (Pet. App. D, p. 17a). The petition for a writ of certiorari was filed on January 15, 1975, Mr. Justice Douglas having extended the time for petitioning to and including January 18, 1975. This Court granted certiorari on March 17, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether as a result of the 1960 amendment (74 Stat. 912) to the Suits in Admiralty Act, 46 U.S.C. 741-752, suits involving public vessels of the United States need no longer be brought under the Public Vessels Act, 46 U.S.C. 781-790, but may be brought under the Suits in Admiralty Act.

STATUTES INVOLVED

The Suits in Admiralty Act, 41 Stat. 525, as amended, 46 U.S.C. 741, *et seq.*, provides in relevant part:

46 U.S.C. 741:

> No vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall, in view of the provision herein made for a libel in personam,

> be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided*, That this chapter shall not apply to the Panama Railroad Company.

46 U.S.C. 742:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

The Public Vessels Act, 43 Stat. 1112, as amended, 46 U.S.C. 781, *et seq.*, provides in relevant part:

46 U.S.C. 781:

> A libel in personam in admiralty may be bought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920.

46 U.S.C. 782:

> Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of chapter 20 of this title [the Suits in Admiralty Act] or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed

> on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for the payment of interest.

46 U.S.C. 785:

> No suit may be brought under sections 781 to 790 of this title by a national of any foreign government unless it shall appear to the satisfaction of the court in which suit is brought that said government, under similar circumstances, allows nationals of the United States to sue in its courts.

STATEMENT

Alleging jurisdiction under the Suits in Admiralty Act, 46 U.S.C. 741-752, and the Public Vessels Act, 46 U.S.C. 781-790, respondent, a Philippine corporation, brought suit against the United States in the United States District Court for the Central District of California. Respondent sought recovery for damages resulting from the sinking of its fishing vessel after a collision with the *U.S.S. Parsons*, a naval destroyer of the United States (App. 5-7). The district court granted the United States' motion for summary judgment (App. 15-17) on the ground that the Philippine corporation was a foreign national subject to the reciprocity provision of the Public Vessels Act, 46 U.S.C. 785, and that respondent had not proved, as it was required to do, that the Philippine government would consent to be sued if a similar action had been brought against it by nationals of the United States (Pet. App. B, p. 13a).

The court of appeals reversed, holding that the 1960 amendment to the Suits in Admiralty Act which, *inter alia*, eliminated the requirement in 46 U.S.C. 742 that any vessel involved in a suit under that Act be "employed as a merchant vessel," broadened the jurisdictional reach of that Act to encompass all maritime actions against the United States, including those previously cognizable only under the Public Vessels Act (Pet. App. A, pp. 5a-8a). The court concluded that since respondent's suit was maintainable under the Suits in Admiralty Act, and since that Act has no reciprocity requirement, the district court should not have granted summary judgment to the United States (Pet. App. A, pp. 7a-8a). In reaching this result the court of appeals acknowledged that it was permitting the circumvention of the Public Vessels Act "in a manner neither explicitly authorized nor perhaps contemplated by Congress" (Pet. App. A, p. 7a).

SUMMARY OF ARGUMENT

In the Public Vessels Act, 46 U.S.C. 781, *et seq.*, Congress has consented to suits against the United States for damages "caused by a public vessel of the United States" (46 U.S.C. 781). The Act provides that such suits shall also be subject to the Suits in Admiralty Act, 46 U.S.C. 741, *et seq.*, to the extent the provisions of the two acts are not inconsistent (46 U.S.C. 782). The Public Vessels Act, however, imposes a number of additional requirements on litigants. Thus, a foreign national cannot bring suit

unless it is established that his government "under similar circumstances, allows nationals of the United States to sue in its courts" (46 U.S.C. 785). In addition, no subpoena can be served on officers or members of the crew of a public vessel without the consent of either the Secretary of the Navy or the Commander of the vessel (46 U.S.C. 784), and in time of war, the Secretary of the Navy may obtain a stay of all proceedings brought under the Public Vessels Act (10 U.S.C. 7721-7730).

In 1960, the Suits in Admiralty Act (but not the Public Vessels Act) was amended to resolve a jurisdictional conflict between district courts and the Court of Claims. Nothing in either the language or legislative history of the 1960 amendment suggests that Congress intended to affect the operation of the Public Vessels Act in any manner. The court of appeals nevertheless held, in effect, that the 1960 amendment to the Suits in Admiralty Act repealed the Public Vessels Act by implication.

The decision of the court of appeals is contrary to settled principles of statutory construction reflected in this Court's decisions. Repeal by implication is not favored, *e.g.*, *Silver* v. *New York Stock Exchange*, 373 U.S. 341, especially where, as here, it finds no support in the legislative history. Moreover, even if the 1960 amendment could literally be read to enlarge the scope of the Suits in Admiralty Act, the specific provisions of the Public Vessels Act must control in suits involving public vessels. *Preiser* v. *Rodriguez*, 411 U.S. 475. Finally, the decision

frustrates congressional intent in a manner that is potentially threatening to United States naval operations and creates an irrational statutory scheme in which application of the requirements of the Public Vessels Act is at the option of the plaintiff.

ARGUMENT

SUITS INVOLVING PUBLIC VESSELS OF THE UNITED STATES MUST BE BROUGHT UNDER THE PUBLIC VESSELS ACT, NOTWITHSTANDING THE 1960 AMENDMENT TO THE SUITS IN ADMIRALTY ACT.

The court of appeals erroneously construed the 1960 amendment to the Suits in Admiralty Act because, we submit, it focused only on the literal wording of the amendment without considering its purpose. As we discuss below, there is no indication in the legislative history that Congress intended the 1960 amendment to the Suits in Admiralty Act to affect the Public Vessels Act in any manner (see pp. 11-17, *infra*)—a conclusion that is confirmed by considering the amendment against the background of prior maritime legislation.[1]

[1] The legislative history that follows is recounted in *Johansen* v. *United States*, 343 U.S. 427, 432-434, *American Stevedores* v. *Porello*, 330 U.S. 446, 450-454, and *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 218-225. See also *Ansell* v. *United States*, 384 U.S. 158, 164-165.

A. The Legislative History of the 1960 Amendment Reveals No Congressional Intent to Modify the Public Vessels Act

This is surely a case where—in Mr. Justice Holmes' phrase—a "page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349. Before 1916 the doctrine of sovereign immunity precluded a suit by a private owner whose vessel was damaged by the negligent operation of a vessel owned or operated by the United States. The United States could, however, sue private owners for damages to its vessels arising from the owner's negligence. Congressional attempts to deal with this inequity through the mechanism of the private bill proved cumbersome and inadequate. Accordingly, in 1916, when Congress passed the Shipping Act, 39 Stat. 728, 46 U.S.C. 801, *et seq.*, it included a provision that vessels of the old Shipping Board "while employed solely as merchant vessels" would be "subject to all laws, regulations, and liabilities governing merchant vessels" even though the United States owned or had an interest in them. 46 U.S.C. 808.

In 1920 in response to this Court's decision in *The Lake Monroe*, 250 U.S. 246, which held that the Shipping Act subjected Shipping Board vessels to proceedings *in rem* in admiralty, including arrest and seizure, Congress enacted the Suits in Admiralty Act, which prohibits the arrest or seizure of any vessel or cargo owned by or in the possession of the United States, as well as any vessel privately owned but operated for or by the United States (46 U.S.C. 741). The Suits in Admiralty Act waived sovereign im-

munity, however, by authorizing a libel *in personam* against the United States in cases involving any vessel owned by, or operated for or by, the United States, provided both that (prior to 1960) the vessel was "employed as a merchant vessel" and that such a proceeding could have been maintained had the vessel been a private vessel.[2] Although the inclusion of "public vessels" under the Suits in Admiralty Act was proposed, Congress was unwilling to extend the Act to cover non-merchant vessels owned by the United States.

In 1925 Congress filled the gap by passing the Public Vessels Act, which authorized a libel *in personam* against the United States "for damages caused by a public vessel of the United States" and for compensation for towage and salvage services rendered to such a vessel. 46 U.S.C. 781. Although the Act specified that suits authorized by it were "subject to" and would "proceed in accordance with" the provisions of the Suits in Admiralty Act "insofar as the same are not inconsistent" with the provisions of the Public Vessels Act (46 U.S.C. 782), it contained special limitations. Thus it prohibited the subpoenaing of officers or members of the crew of public vessels without the government's consent, 46 U.S.C. 784, and it barred any suit by a national of a foreign government unless the plaintiff could establish that his government, in similar circumstances, would allow nationals of the United States to sue in its courts. 46 U.S.C. 785.

[2] Before 1960 the Suits in Admiralty Act, 46 U.S.C. (1958 ed.) 742, provided in relevant part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of commencement of the action herein provided for, a libel in personam may be brought against the United States or against any corporation mentioned in section 741 of this title, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. * * *

Although the combination of the Suits in Admiralty Act and the Public Vessels Act gave jurisdiction to the admiralty side of federal district courts in all maritime actions against the United States involving vessels, prior to 1960 such jurisdiction did not exist over non-vessel maritime contract or tort claims against the United States. Such maritime contract claims were cognizable only in the Court of Claims (or on the law side of federal district court if the claim did not exceed $10,000) under the Tucker Act, 28 U.S.C. 1346(a)(2), 1491, while such maritime tort claims were cognizable only on the law side of federal district court under the Federal Tort Claims Act, 28 U.S.C. 1346(b), *et seq.*[3]

Prior to 1960, courts and litigants involved in maritime actions against the United States were thus faced with at least two sets of jurisdictional dichotomies: (1) vessel claims versus non-vessel claims and (2) "merchant" vessel claims versus "non-merchant" vessel claims.

[3] See, *e.g.*, *Somerset Seafood Co.* v. *United States*, 193 F.2d 631 (C.A. 4).

In a number of factual contexts it became difficult for courts to determine whether a claim was a vessel claim, cognizable on the admiralty side of federal district court, or a non-vessel claim, cognizable in the Court of Claims.[4] This difficulty created serious problems for litigants. The Court of Claims had no power to transfer actions erroneously commenced under the Tucker Act to the federal district courts, and since the Tucker Act has a six-year limitation

[4] For example, in *Eastern Steamship Lines* v. *United States*, 187 F.2d 956 (C.A. 1), the court held that an action by the private owner of a vessel, which had been chartered by the United States for wartime use, to recover $5 million in restoration costs could not be maintained in federal district court under either the Suits in Admiralty Act or the Public Vessels Act but only in the Court of Claims under the Tucker Act. On the other hand, in *Aliotti* v. *United States*, 221 F.2d 598 (C.A. 9), the court held on virtually the same facts that such an action was maintainable exclusively on the admiralty side of federal district court under the Public Vessels Act. This Court noticed, but had no occasion to resolve, the conflict, although it warned that "[i]t is not to be assumed that all claims sounding in contract form the basis of a suit under the Public Vessels Act." *Calmar Steamship Corp.* v. *United States*, 345 U.S. 446, 456, n.8.

The widespread nature of the problem was reflected in the fact that on a single day in 1954 the Court of Claims dismissed six actions brought under the Tucker Act on the ground that they were cognizable only on the admiralty side of federal district court under the Suits in Admiralty or Public Vessels Acts. *Wessel, Duval & Co.* v. *United States*, 124 F.Supp. 636; *Waterman Steamship Corp.* v. *United States*, 124 F. Supp. 634; *Sinclair Refining Co.* v. *United States*, 124 F. Supp. 628; *Compania Ithaca De Vapores, S.A.* v. *United States*, 124 F. Supp. 627; *Polar Compania De Navegacion* v. *United States*, 124 F. Supp. 625; *Lykes Bros. Steamship Co.* v. *United States*, 124 F. Supp. 622.

period (28 U.S.C. 2401(a)) while the two admiralty acts have a two-year limitations period (46 U.S.C. 745, 782), litigants who misfiled in the Court of Claims often found that it was too late to file anew in federal district court. Litigants could not protect themselves by filing simultaneously in both courts because under 28 U.S.C. 1500 the Court of Claims has no jurisdiction over, and is bound to dismiss, any claim that is the subject of a pending suit against the United States in any other court. *Wessel, Duval & Co.* v. *United States*, 124 F. Supp. 636 (Ct. Cl.).

Moreover, courts had trouble determining whether a particular vessel was "employed as a merchant vessel" within the meaning of the Suits in Admiralty Act.[5] As this Court pointed out in *Calmar Steamship Corp.* v. *United States*, 345 U.S. 446, 455, the consequence of holding that a vessel was not "employed as a merchant vessel" was usually insignificant where the vessel was publicly owned by the United States since "in the great[er] number of instances * * * the libel is dismissed under the Suits in Admiralty Act only to be heard under the Public Vessels Act in the same admiralty court." However, when the vessel was privately owned but operated by or for the

[5] Thus in *Calmar Steamship Corp.* v. *United States, supra*, this Court reversed the Second Circuit and held that a privately owned vessel operated for hire by the United States and engaged on a war mission was "employed as a merchant vessel," while in *Geo. W. Rogers Const. Corp.* v. *United States*, 118 F. Supp. 927 (S.D. N.Y.), the court, distinguishing *Calmar*, held that a United States Merchant Marine vessel which was carrying fuel oil for the United States Navy during peacetime was not "employed as a merchant vessel."

United States, "to hold that she was not employed as a merchant vessel [was] to relegate the libelant, on a contract claim substantial enough not to be cognizable on the law side under the Tucker Act, 28 U.S.C. (Supp. III) § 1346, to the Court of Claims." *Ibid.*; footnote omitted. The Court found this troubling because "the District Courts are, in our judicial system, the accustomed forum in matters of admiralty; everything else being equal, no efforts should be made to divert this type of litigation to judges less experienced in admiralty." *Ibid.*

Congressional efforts to extricate the courts and litigants from these jurisdictional quiddities began in 1958 when the House of Representatives passed a bill amending Title 28 of the United States Code to permit the transfer of cases between the Court of Claims and federal district courts.[6] An identical bill[7] was passed by the House in 1959 and considered by the Senate Committee on the Judiciary. During its deliberations, the Senate Judiciary Committee received a communication from the Secretary of Commerce, as head of the Federal Maritime Administration, criticizing the House transfer bill as inadequate and recommending direct amendment of the Suits in Admiralty Act in order to "attack the problem on a fundamental basis" and eliminate the problems arising from "uncertainty as to the field of jurisdiction of the Court of Claims and the district courts of the United States." S. Rep. No. 1894, 86th Cong., 2d Sess. 8-11 (1960).

[6] The bill, H.R. 3046, 85th Cong., 2d Sess., was passed on July 21, 1958 (104 Cong. Rec. 14433-14434 (1958)), but it did not emerge from the Senate Committee on the Judiciary before the expiration of the 85th Congress.

[7] H.R. 5396, 86th Cong., 1st Sess. (1959).

In accordance with this recommendation, in which the Department of Justice and the Maritime Law Association concurred, the Judiciary Committee added a new section to the House bill which directly amended the Suits in Admiralty Act in two ways. First, it provided that if an admiralty proceeding could be maintained in a given case "if a private person or property were involved," a similar admiralty proceeding could be brought against the United States. Second, it struck the proviso that if a vessel were involved it had to be "employed as a merchant vessel." This version of the House bill, which was reported favorably by the Senate Judiciary Committee, became law on September 13, 1960.[8]

The 1960 amendment to the Suits in Admiralty Act removed the "uncertainty as to the field of jurisdiction of the Court of Claims and the district courts of the United States" (S. Rep. No. 1894, *supra*, at p. 10) by effectively eliminating the quasi-admiralty jurisdiction of the Court of Claims. The addition of

[8] 74 Stat. 912. The present version of 46 U.S.C. 742 provides in relevant part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against any corporation mentioned in section 741 of this title. * * *

the phrase "or if a private person or property were involved" to 46 U.S.C. 742 guarantees that those non-vessel maritime contract claims previously held cognizable in the Court of Claims, as well as those non-vessel maritime tort claims previously held cognizable on the law side of federal district court, would be cognizable on the admiralty side of federal district court.[9] Thus, the old dichotomy between vessel and non-vessel claims is virtually extinct.[10] Similarly, the elimination of the phrase "employed as a merchant vessel" from 46 U.S.C. 742 guarantees that all maritime claims involving privately owned vessels operated for or by the United States, which previously

[9] In the following cases the courts held that maritime tort claims against the United States, previously cognizable on the law side of federal district court under the Federal Tort Claims Act, were cognizable only on the admiralty side of federal district court under the Suits in Admiralty Act as a result of the 1960 amendment: *T. J. Falgout Boats, Inc.* v. *United States*, 361 F. Supp. 838 (C.D. Cal.), affirmed, 508 F.2d 855 (C.A. 9), petition for a writ of certiorari filed March 22, 1975 (No. 74-1215); *Roberts* v. *United States*, 498 F.2d 520 (C.A. 9), certiorari denied, December 15, 1974 (No. 74-368); *De Bardeleben Marine Corp.* v. *United States*, 451 F.2d 140 (C.A. 5); *Utzinger* v. *United States*, 246 F. Supp. 1022 (S.D. Ohio); *Tankrederiet Gefion A/S* v. *United States*, 241 F. Supp. 83 (E.D. Mich.); *Tebbs* v. *Baker-Whitely Towing Co.*, 227 F. Supp. 656 (D. Md.); *Beeler* v. *United States*, 224 F. Supp. 973 (W.D. Pa.), reversed on other grounds, 338 F.2d 687 (C.A. 3).

[10] There may still be isolated instances in which claims arising in a maritime context will be cognizable in the Court of Claims. In *Amell* v. *United States*, 384 U.S. 158, this Court held that wage claims (exceeding $10,000) by government employees who were also seamen were cognizable exclusively in the Court of Claims under the Tucker Act, and not in federal district court under the Suits in Admiralty Act.

might have been relegated to the Court of Claims (see *supra*, pp. 13-14), will be heard in federal district court, regardless of whether the vessels are "merchant" vessels.

Congress had a particular problem before it, which stemmed from the division of jurisdiction between the district courts and the Court of Claims, and the 1960 amendments were aimed at solving that problem. Of course, no such problems existed prior to 1960 with respect to claims involving *publicly* owned vessels of the United States since, as this Court observed in *Calmar* (see *supra*, p. 13), if the district court determined that such vessels were not "merchant" vessels the claims could still be heard in the same court under the Public Vessels Act. Hence the elimination of the phrase "employed as a merchant vessel" in the Suits in Admiralty Act was not designed to disturb the ongoing admiralty jurisdiction of the federal district courts under the Public Vessels Act over claims involving publicly owned vessels of the United States.

As the court below pointed out, the Suits in Admiralty Act, as amended in 1960, now could be read to encompass suits against the United States regarding any type of vessel, including "public vessels." Whether such a reading should be made is quite another matter. In support of its view, the court of appeals cited *Ira S. Bushey & Sons, Inc.* v. *United States*, 398 F.2d 167 (C.A. 2), *T. J. Falgout Boats, Inc.* v. *United States*, 361 F. Supp. 838 (C.D. Cal.), affirmed, 508 F.2d 855 (C.A. 9), petition for a writ of certiorari filed March 22, 1975 (No. 74-1215), and

Richmond Marine Panama, S.A. v. *United States*, 350 F. Supp. 1210 (S.D.N.Y.). But these decisions do not support the proposition, stated by the court below, that, as a result of the 1960 amendment, many courts have held that the Suits in Admiralty Act now encompasses "all maritime claims against the United States, regardless of the type of vessel involved" (Pet. App. A, pp. 6a-7a).

In *Ira S. Bushey* the court of appeals held only that the amended Suits in Admiralty Act encompassed a maritime tort claim that the district court had ruled was cognizable solely under the Federal Tort Claims Act.[11] The court's remark that the purpose of the 1960 amendment was to bring "all maritime claims against United States vessels *into the admiralty jurisdiction of the district courts*" (398 F.2d at 169; emphasis added) must be read to refer to those maritime claims previously cognizable in the Court of Claims or on the law side of federal district courts, since even prior to 1960 claims involving publicly owned vessels of the United States were cognizable solely in the "admiralty jurisdiction of the district courts" under the Public Vessels Act.[12] A careful

[11] Although the court also indicated its belief that admiralty jurisdiction could have been found under the Public Vessels Act as well, it did not explicitly so hold. In any event, there is no indication that it would have made a practical difference in that case whether admiralty jurisdiction was assumed under the Suits in Admiralty Act or the Public Vessels Act, and the court of appeals did not address itself, much less purport to decide, the issues raised in this case.

[12] *T. J. Falgout Boats, supra*, also involved a claim filed under the Federal Tort Claims Act. There the plaintiff sought to recover for damages to its vessel allegedly caused by a missile released from a navy airplane. A public vessel was not involved and neither the district court nor the court of appeals referred to the Public Vessels Act.

reading of the district court's supplemental opinion in *Richmond Panama, supra*, 350 F. Supp. at 1219-1221, which the court below also cited, reveals that plaintiff's claim was brought solely under the Suits in Admiralty Act and involved the negligence of Coast Guard personnel, not damage caused by a publicly owned vessel of the United States. None of these cases held, as the court of appeals here has held, that as a result of the 1960 amendment, the Suits in Admiralty Act supersedes the Public Vessels Act in cases involving publicly owned vessels of the United States.

In sum, although as a result of the 1960 amendment deleting the phrase "employed as a merchant vessel," the Suits in Admiralty Act could literally be read to authorize proceedings against "public vessels," no other court has adopted this interpretation and the history of the amendment demonstrates that Congress did not intend such a reading, which would have the effect of repealing the Public Vessels Act. As shown above, the 1960 amendment was designed solely to cure a jurisdictional problem arising from the quasi-admiralty jurisdiction of the Court of Claims—a problem that never existed in suits under the Public Vessels Act since such suits were always cognizable in district courts. There is nothing to commend the contrary interpretation of the court of ap-

peals in this case. Surely an objection to the reciprocity requirement of the Public Vessels Act cannot support the decision below.[13] Any change in that requirement is for Congress to consider and in enacting the 1960 amendment to the Suits in Admiralty Act Congress did not address the matter.

B. The Construction of the 1960 Amendment by The Court of Appeals is Contrary to Settled Principles of Statutory Construction

Although this case involves only the reciprocity requirement of the Public Vessels Act, the decision of the court of appeals effectively repeals the Public Vessels Act in its entirety because the court held that suits involving public vessels need not be brought under the Public Vessels Act. Given such an option, the plaintiff's choice is clear. This repeal by implication of the Public Vessels Act was accomplished by the court of appeals despite its recognition that such repeal was "neither explicitly authorized nor perhaps contemplated by Congress" (Pet. App. A, p. 7a). But it is well settled that repeal by implication is not favored, *e.g.*, *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357, especially when, as here, the purposes of the 1960 amendment were wholly unrelated to the policies of the Public Vessels Act.

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[13] Compare the statement of the court below that "our conclusion here is consonant with the modern view which liberally construes waivers of governmental immunity" (Pet. App. A, p. 8a).

The fact that the 1960 amendment can be literally read to encompass suits involving public vessels does not justify construing it to supersede the Public Vessels Act. Congress recognized that the provisions of the Public Vessels Act and the Suits in Admiralty Act are not entirely consistent (46 U.S.C. 782) and that suits involving public vessels must satisfy the specific requirements of the Public Vessels Act.

As this Court has held, "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling." *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208; *MacEvoy Co.* v. *United States*, 322 U.S. 102, 107. This principle applies even if the general terms became effective, as here, subsequent to the specific terms. *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758.

Thus in *Preiser* v. *Rodriguez*, 411 U.S. 475, 489, the Court held that the specific terms of the federal habeas corpus statute (28 U.S.C. 2254) provided the exclusive remedy for state prisoners attacking the validity of the fact or length of their confinement "despite the literal applicability" of the broad general language of 42 U.S.C. 1983. The Court ruled that since the habeas corpus statute was "explicitly and historically designed" to cover the situation, its terms "must override the general terms of § 1983." 411 U.S. at 489, 490.

The Public Vessels Act was "explicitly and historically designed" to cover claims, such as the instant one, involving publicly owned vessels of the United States, and suits presenting such claims must

satisfy the requirements of the specific terms of the Public Vessels Act, even if they come within the literal terms of Suits in Admiralty Act.

Respondent's suit, involving a claim of damages caused by a Navy destroyer, is covered by the Public Vessels Act, and the court of appeals erred in reversing the district court's judgment that respondent's failure to satisfy the reciprocity requirement of the Act was fatal to its claim.

C. The Decision of the Court of Appeals Nullifies Important Congressional Policies

Since the decision of the court of appeals effectively repeals the Public Vessels Act, it will, if permitted to stand, nullify several important congressional policies concerning suits involving public vessels.

For example, under 46 U.S.C. 784, officers and members of the crew of any publicly owned vessel of the United States may not be subpoenaed in connection with any suit authorized under the Public Vessels Act without the consent of the Secretary of the Department or the person in control of the vessel at the time of the issuance of the subpoena. No such protection exists in suits authorized under the Suits in Admiralty Act.

More important, pursuant to 10 U.S.C. 7721-7730, the Secretary of the Navy, during time of war, may obtain a stay of any suit or proceedings brought under the Public Vessels Act when it appears that prosecution of the suit might interfere with naval operations. No such protection is available for suits brought under the Suits in Admiralty Act. The decision of the court of appeals nullifies the protection afforded by 10 U.S.C. 7721-7730 with potentially serious implications for the security of naval operations.[14]

The financial and administrative implications of the decision of the court of appeals are also substantial. The Suits in Admiralty Act permits interest on judgments to accrue from the time suit is filed. 46 U.S.C. 745. The Public Vessels Act, on the other hand, does not allow interest to accrue prior to the time of judgment. 46 U.S.C. 782. If the suit here proceeded under the Suits in Admiralty Act and respondent prevailed, the difference in the interest award would approximate $250,000.

Why these policies reflected in the Public Vessels Act and the reciprocity requirement may be disregarded at the pleader's option is impossible to say. Still less is there any reason why Congress could ever have intended such a result. Yet that is the consequence if the decision below stands since litigants could then bring actions under the Suits in Admiralty Act that otherwise could have been brought only under the Public Vessels Act.[15] The unsoundness

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[14] We are advised by the Department of the Navy that the Secretary obtained stays under 10 U.S.C. 7721-7730 in 12 suits during World War II.

[15] The court of appeals pointed out that the more stringent venue requirements of the Suits in Admiralty Act may effectively preclude some foreign nationals from using it, thus relegating them to the Public Vessels Act, which provides venue "in any district court of the United States" (46 U.S.C. 782) when the other venue requirements cannot be met (Pet. App. A, pp. 7a-8a). The court's observation in this regard

of such a statutory scheme in itself indicates that the court of appeals has misinterpreted the Suits in Admiralty Act.

CONCLUSION

For the foregoing reasons the judgment of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted.

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MAY 1975.

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underscores the incorrectness of the result it reached. For it is difficult to imagine why Congress would have desired to have the applicability of the Public Vessels Act turn on whether the plaintiff could meet the venue requirements of the Suits in Admiralty Act and to have amended that Act to cover all claims previously covered by the Public Vessels Act and, yet at the same time, to have failed to provide a venue for some litigants.

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1975.

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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-869

UNITED STATES OF AMERICA,
Petitioner,

vs.

UNITED CONTINENTAL TUNA CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

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SUBJECT INDEX

I — Page

Statement of the Case 1

II

Questions Presented 2

III

Summary of Argument 3

IV

Sovereign Immunity: An Historical Anachronism 5

V

Tuna Corporation Can Sue the United States Under the SIA as Amended in 1960 10

A. Background of the SIA and PVA 10

B. Other Judicial Interpretations of the 1960 Amendment to the SIA 16

C. If There Is Any Doubt Concerning Proper Construction of the SIA, It Should Be Broadly and Liberally Construed in Favor of Innocent Victims of Government Negligence 19

D. The Government's Policy Reasons for Favoring Narrow Construction Are Lacking in Merit 21

VI

Tuna Corporation Can Recover Under the PVA, in Any Event, Since It Is an American Shipowner 22

VII

Even if Tuna Corporation Were Treated Under the PVA as a Philippine Shipowner, Which It Should Not Be, the Reciprocity Clause Would Be No Bar to Recovery Because It Is Unconstitutional 25

VIII

Conclusion 27

TABLE OF AUTHORITIES CITED

Cases — Page

Amell v. United States, 384 U.S. 158 (1966) 13

Ayala v. Philadelphia Bd. of Public Ed., 453 Pa. 584, 305 A.2d 877 (1973) 8

Bank of New York v. Philippine Islands, 296 U.S. 497 (1935) 21

Bartholomew v. Universe Tankships, Inc., 263 F.2d 437 (2nd Cir. 1959), cert. den. 357 U.S. 1000 .. 23

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Bd. of Comm'rs of Port of New Orleans v. Splendour Shipping & Enterprises Co., Inc., 273 So. 2d 19 (La. 1973) 8

Calmar S.S. Corp. v. United States, 345 U.S. 446 (1952) 12

Campbell v. State, ... Ind. ...., 284 N.E.2d 733 (1972) 8

Cohens v. Commonwealth of Virginia, 6 Wheat. 264, 411-12, 5 L.Ed. 257 (1821) 6

De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971) 17, 18, 20

Dist. of Columbia Nat. Bank v. Dist. of Columbia, 348 F.2d 808 (D.C. Cir. 1965) 21

Dyer v. National Steam Nav. Co., 118 U.S. 507 (1886) 22

Evans v. Bd. of County Comm'rs, 147 Colo. 97, 482 P.2d 968 (1971) 8

Graham v. Richardson, 403 U.S. 365 (1971) 25

Page

Gulf Oil Corp. v. Panama Canal Co., 407 F.2d 24 (5th Cir. 1969) 19

Haney v. City of Lexington, 386 S.W.2d 738 (Ky. 1964) 8

Hargrove v. Town of Cocoa Beach, 96 So.2d 130 (Fla. 1957) 8

Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306 (1970) 22, 23

Holytz v. City of Milwaukee, 1 Wis.2d 26, 115 N.W.2d 618 (1962) 8

Ira S. Bushey & Son, Inc. v. U.S., 398 F.2d 167 (2nd Cir. 1968) 16

Johnson v. Municipal Univ. of Omaha, 184 Neb. 512, 169 N.W.2d 286 (1969) 8

J. W. Peterson Coal & Oil Co. v. United States, 323 F.Supp. 1198 (N.D. Ill. 1970) 14

Molitor v. Kaneland Comm. Unit. Dist., 18 Ill.2d 11, 163 N.E.2d 89 (1959), cert. den. 362 U.S. 968 8

Muskopf v. Corning Hospital Dist., 55 Cal.2d 211, 359 P.2d 457 (1961) 5, 6, 8, 9

New York Trust Co. v. Eisner, 256 U.S. 345 (1921) 5

Orion Shipping & Trading Co. v. U.S., 247 F.2d 755 (9th Cir. 1957) 24

Pacific Northwest Bell Telephone Co. v. United States, 378 F.Supp. 297 (W.D. Wash. 1974) 18

Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963) 8

Richmond Marine Panama, S.A. v. United States, 350 F.Supp. 1210 (S.D.N.Y. 1972) 18, 22

Page

Roberts v. United States, 498 F.2d 520 (9th Cir. 1974), cert. den. Dec. 15, 1974 (No. 74-368) 14, 18

Scheele v. City of Anchorage, 385 P.2d 582 (Alas. 1963) 8

Sei Fujii v. State of California, 38 Cal.2d 718 (1952) 25

Smith v. State, 93 Ida. 795, 473 P.2d 937 (1970) 8

Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962) 8

Spencer v. General Hosp. of Dist. of Columbia, 425 F.2d 479 (D.C. Cir. 1969) 7, 8

Tankrederiet Gefion A/S v. United States, 451 F. Supp. 83 (E.D. Mich. 1964) 14, 18

Tebbs v. Baker-Whitely Towing Co., 227 F.Supp. 656 (D. Md. 1964) 18

T. J. Falgout Boats, Inc. v. United States, 361 F. Supp. 838, aff'd 508 F.2d 855, pet. cert. filed March 22, 1975 (No. 74-1215) 15, 18

United Philippine Line, Inc. v. Submarine USS DANIEL BOONE, 475 F.2d 478 (4th Cir. 1973) 3, 16, 17, 26

United States v. Reliable Transfer Co., Inc., ... U.S. ...., 43 L.W. 4610 (1975) 9

United States v. Yellow Cab Co., 340 U.S. 543 (1950) 7

Utzinger v. United States, 246 F.Supp. 1022 (S.D. Ohio, 1965) 18

Veach v. City of Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967) 8

Page

Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961) 8

Willis v. Dept. of Conservation & Econ. Dev., 55 N.J. 534, 264 A.2d 34 (1970) 8

Miscellaneous

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New Hampshire Revised Statutes Annotated (1968) Sec. 412.3 8

New Mexico Statutes Annotated (1966) Sec. 5-6-18 to 22 8

Page

New York Court of Claims Act (1963) Sec. 8 8

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North Dakota Central Code, Sec. 39-01-08 8

Oklahoma Statutes Annotated, Title 11 (1973) Sec. 30.260-300 8

Philippine Civil Code, Sec. 2176 26

Philippine Civil Code, Sec. 2180 26

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United States Code, Title 26, Sec. 1248 1

United States Code, Title 28, Sec. 1346(a)(2) 7

United States Code, Title 28, Sec. 1346(b) 7

United States Code, Title 28, Sec. 1497 7

United States Code, Title 28, Sec. 1498 7

United States Code, Title 46, Sec. 72 10

United States Code Annotated, Title 46, Sec. 741 .. 2

United States Code, Title 46, Sec. 742 11

United States Code Annotated, Title 46, Sec. 781 .....2, 3, 10

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Utah Code Annotated (1968) Secs. 63-30-1 to 63-30-34 8

Page

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IN THE

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UNITED CONTINENTAL TUNA CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

I

Statement of the Case.

Respondent United Continental Tuna Corporation (hereinafter "Tuna Corporation") was organized in 1969 by eight United States citizens of Missouri and Arkansas, who together owned 99.5% of the company's stock (A.13). Tuna Corporation was incorporated under the laws of the Republic of the Philippines for the purpose of enabling the company to operate a fishing vessel in the Philippine Islands. The company was organized by these United States citizens in accordance with the 1962 Revenue Act, 26 U.S.C. 1248, which extended tax benefits and other incentives to United States citizens to encourage them to invest in the Re-

public of the Philippines and other under-developed countries.

In late 1969, Tuna Corporation, with funds furnished by its United States shareholders, purchased a vessel, the M.V. ORIENT, in San Pedro, California. Tuna Corporation spent approximately one million dollars in San Pedro purchasing and fitting out ORIENT (A.7).

On December 1, 1969, ORIENT sailed on its maiden voyage, bound from California to the Philippines. After proceeding only 70 miles from San Pedro, and while near San Nicolas Island, California, ORIENT was rammed by a negligently-operated U.S. Navy missile frigate, the U.S.S. PARSONS (A.6). ORIENT's hull was severely ruptured below the water line, as a result of which she sank within minutes. ORIENT and all equipment on board were lost. By reason of the sinking, the American shareholders of Tuna Corporation have suffered a loss of approximately one million dollars (A.7).

II

Questions Presented.

Petitioner, United States, seeks review of the basis upon which the Court of Appeals decided the case in Tuna Corporation's favor, *i.e.*, that a claim for damage caused by a public vessel of the United States will lie under the Suits in Admiralty Act, 46 U.S.C.A. 741 *et seq.* (hereinafter "SIA") as amended in 1960.

Since the Court of Appeals ruled in Tuna Corporation's favor on this issue, it was unnecessary for that court to rule upon, and it did not rule upon, Tuna Corporation's alternative argument that it is entitled in any event to recover under the Public Vessels Act, 46

U.S.C.A. 781 *et seq.* (hereinafter "PVA"), because Tuna Corporation is a United States shipowner not affected by the reciprocity clause, 46 U.S.C.A. 785, and, moreover, because that reciprocity clause is unconstitutional in that it denies equal protection of the laws to certain aliens. Tuna Corporation respectfully requests that, if this Court reverses the Court of Appeals on the SIA issue, it consider its alternative theory of recovery under the PVA.

III

Summary of Argument.

Tuna Corporation and its American shareholders are innocent victims of the Government's negligence. There is no equitable reason why the United States should not be compelled to stand trial for this tort, just as would any private shipowner. The United States frequently sues private shipowners, including Filipinos, for damage they cause to United States public vessels.[1] The United States should be compelled in this action to respond reciprocally for the damage its public vessel caused.

The Government defends upon the basis that it has sovereign immunity and can only be sued by those persons it selects and only for those torts it selects. It states it has not agreed to be sued by Filipino shipowners, even though it sues Filipinos for the same type of damage. As appears hereinafter, this defense of governmental immunity, upon which the United States relies, is in total disrepute. In the past fifteen years it has been judicially abrogated by eighteen State

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[1]As an example, see *United Philippine Line, Inc. v. Submarine USS DANIEL BOONE*, 475 F.2d 478 (4th Cir. 1973).

Supreme Courts as well as the District of Columbia and has been legislatively abolished in many other states.

Tuna Corporation's action will lie within the legislative framework created by Congress and, specifically, under the SIA as amended in 1960, which plainly and unequivocally provides that "In cases where if such vessel were privately owned or operated, . . . a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . ." The reciprocity clause of the PVA, upon which the Government relies, does not apply to actions filed under the SIA. Accordingly, Tuna Corporation is entitled to sue under the SIA. Any ambiguity in the SIA, and there is none, is to be liberally resolved against the sovereign.

Moreover, Tuna Corporation can sue the United States under the PVA. In admiralty matters, the state in which a shipowner is incorporated is disregarded, and his citizenship determined by the residence of its shareholders and its principal place of business, which in this instance is the United States. In short, Tuna Corporation is treated, under the admiralty law, as an American shipowner and the reciprocity clause does not prevent it from suing the United States under the PVA. Even if Tuna Corporation were treated as a Philippine citizen, which it should not be, the reciprocity clause still would not prevent a Philippine shipowner from recovering for Government negligence under the PVA for the reason that the reciprocity clause is void as a blatant unconstitutional denial to Filipinos of equal protection of the laws.

IV

Sovereign Immunity: An Historical Anachronism.

There is no act of Congress nor constitutional provision insulating the United States from liability for negligently sinking ORIENT. The Government's defense is that the United States has not consented, in the PVA or SIA, to be sued for such liability and, in the absence of such consent, the United States cannot be sued. In other words, the Government's defense is the judicially created doctrine of sovereign immunity. This is surely a defense concerning which, as the Government has noted, "a page of history is worth a volume of logic."[2]

Sovereign immunity originated as a personal prerogative of the King of England.[3] In the feudal society, the lord of the manor was not subject to suit in his own courts, and the King, the highest feudal lord, enjoyed the same protection in his courts.[4] Until the 16th century the prerogative of the King was purely personal, but then a metaphysical concept emerged that converted the personal prerogative of the King into the sovereign immunity of the state.[5]

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[2]Gov. Br. 9; *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

[3]For a detailed history of sovereign immunity see: *Muskopf v. Corning Hospital Dist.*, 55 Cal.2d 211, 359 P.2d 457 (1961); Borchard, *Governmental Responsibility for Tort*, 34 Yale L.J. 129; Casner and Fuller, *Municipal Tort Liability in Operation*, 54 Harv. L. Rev. 437; Yankwich, *Problems Under the Federal Tort Claims Act*, 9 FRD 143.

[4]1 Pollock and Maitland, *The History of English Law* [1909 ed.] at pp. 512-517; 3 Holdsworth, *History of English Law* [1922 ed.] 462.

[5]Watkins, *The State As Party Litigant*, 11 [Johns Hopkins University Studies in History and Political Science, Series XLV, No. 1 (1927)]; 4 Holdsworth, *History of English Law, supra*, at pp. 190-197.

In England, nevertheless, that concept did not operate as a total denial of relief to the victims of the King's negligence. It only denied jurisdiction to claimants in the King's courts, since those courts could not have jurisdiction over the King. There was jurisdiction, however, in the Court of Exchequer for equitable relief against the Crown.[6] The method for obtaining relief in that court was the petition of right. It was unthinkable that the King would invoke his prerogative in the Court of Exchequer, since "it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him." It was freely acknowledged that to the petition "there must always be a reply: 'Let right be done' ".[7] The petition of right, accordingly, was a definite legal remedy against the Crown. In addition to the petition, a claimant always had the right to sue the king's officers personally, and from the earliest times those officers had to have sufficient financial standing to make the remedies against them meaningful.[8]

How the English practice became the basis for a rule in the United States that federal and state governments did not have to answer for their torts has been called "one of the mysteries of legal evolution". Borchard, *Governmental Responsibility in Tort,* 34 Yale L.J. 1, 4. The misconception of English precedents apparently began in 1821 when Marshall, in *Cohens v. Commonwealth of Virginia,*[9] opined without explanation that "The universally received opinion is, that no suit can be commenced or prosecuted

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[6]*Muskopf v. Corning Hosp. Dist., supra,* 214-15.

[7]*Id.*

[8]*Id.*

[9]6 Wheat. 264, 411-12, 5 L.Ed. 257, 293 (1821).

against the United States; that the judiciary act does not authorize such suits." Thus, the English doctrine of sovereign immunity, which did not operate to prevent claimants from recovering, achieved in the United States a harshness which never could be rationalized. Congress over the years has ameliorated the judicially-created doctrine with private bills and with piecemeal remedial legislation and the courts, in recognition of its gross inequity, have judicially created numerous exceptions to the doctrine.[10]

Few doctrines in the law have sustained such voluminous, searching and nearly unanimous attack as the American judicially-created principle that government should not respond in damages for their torts except where it has consented to do so.[11] The old rationalization that "it is better than an individual should sustain an injury than that the public should suffer an inconvenience" runs counter to both the traditional tort principle that *vis-a-vis* the innocent victim the wrongdoer should pay, and modern tort concepts of risk distribution and cost allocation.[12] At this time, no less than

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[10]See *United States v. Yellow Cab Co.,* 340 U.S. 543, 548-49 (1950) concerning the hundreds of private relief acts passed by each Congress to compensate parties for the negligence of Government employees. Congressional acts ameliorating sovereign immunity included The Tucker Act of March 3, 1887 [28 U.S.C. 1346(a)(2)], the Patent Infringement Act of June 25, 1910 [28 U.S.C. 1498], the SIA, the PVA, the Oyster Bed Damage Act of August 30, 1935 [28 U.S.C. 1497], and the Federal Tort Claims Act of August 2, 1946 [28 U.S.C. 1346(b)]. The courts judicially mitigated the harshness of the doctrine by creating the governmental-proprietary distinction and other exceptions. See *Spencer v. General Hosp. of Dist. of Columbia,* 425 F.2d 479, 485 (D.C. Cir. 1969).

[11]*Spencer v. General Hosp. of Dist. of Columbia, supra,* 486-87.

[12]*Id.,* 218-19.

18 State Supreme Courts have judicially abrogated governmental immunity and it has been legislatively abolished or severely altered in at least 23 more states.[13]

[13]States judicially abrogating governmental immunities include Alaska, *Scheele v. City of Anchorage*, 385 P.2d 582 (Alas. 1963); Arizona, *Veach v. City of Phoenix*, 102 Ariz. 195, 427 P.2d 335 (1967); California, *Muskopf v. Corning Hosp. Dist., supra;* Colorado, *Evans v. Bd. of County Comm'rs.*, 147 Colo. 97, 482 P.2d 968 (1971); Florida, *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957); Idaho, *Smith v. State*, 93 Ida. 795, 473 P.2d 937 (1970); Illinois, *Molitor v. Kaneland Comm. Unit. Dist.*, 18 Ill.2d 11, 163 N.E.2d 89 (1959), cert. den. 362 U.S. 968; Indiana, *Campbell v. State*, ... Ind. ...., 284 N.E.2d 733 (1972); Kentucky, *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964); Louisiana, *Bd. of Comm'rs of Port of New Orleans v. Splendour Shipping & Enterprises Co., Inc.*, 273 So.2d 19 (La. 1973); Michigan, *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); Minnesota, *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962); Nebraska, *Johnson v. Municipal Univ. of Omaha*, 184 Neb. 512, 169 N.W. 2d 286 (1969); Nevada, *Rice v. Clark County*, 79 Nev. 253, 382 P.2d 605 (1963); New Jersey, *Willis v. Dept. of Conservation & Econ. Dev.*, 55 N.J. 534, 264 A.2d 34 (1970); Pennsylvania, *Ayala v. Philadelphia Bd. of Public Ed.*, 453 Pa. 584, 305 A.2d 877 (1973); Rhode Island, *Becker v. Beaudoin*, 106 R.I. 562, 261 A.2d 896 (1970); and Wisconsin, *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962). See, also, District of Columbia, *Spencer v. Gen. Hosp. of Dist. of Columbia, supra.* Seven state legislatures have legislatively abolished the doctrine; Hawaii, Hawaii Rev. Stat. §662-1 to 662-15 (1968); Iowa, Iowa Code Ann. §25 A.1 to 25 A.20 (1967); New York, N.Y. Ct. Cl. Act §8 (1963); Oklahoma, Okla. Stat. Ann., Tit. 11, §30.260-300 (1973); Utah, Utah Code Ann., §63-30-1 to 63-30-34 (1968); and Washington, Wash. Rev. Code Ann., 4.92.090 (1972). Partial abolition has legislatively occurred in six other states; Connecticut, Conn. Gen. Stat, Rev. §4-141 et seq. (1966); North Carolina, N.C. Gen. Stat. § 143-291 *et seq.* (1964); South Carolina, S.C. Code Ann. §10-2621 *et seq.* (Supp. 1971); Tennessee, Tenn. Code Ann. §9-812 to 814 (1955); Texas, Tex. Rev. Civ. Stat. Ann., art. 6252 (1970); West Virginia, W. Va. Code Ann. §8-12-7(b) (1969). Seven other states have authorized the purchase of insurance and submit themselves to suit: Georgia, Ga. Code Ann. §56-2437 (1971); Kansas, Kan. Stat. Ann., §74-4715-16 (1971); Maine, Me. Rev. Stat. Ann., Tit. 14, §157 (1972); Montana, Mont. Ann. Stat. §226.092 (1972); New Hampshire, N.H. Rev. Stat. Ann. §412.3 (1968); New Mexico, N.M. Stat. Ann. §5-6-18 to 22 (1966); North Dakota, N.D. Cent. Code §39-01-08.

The doctrine survives, if at all, only as a result of inertia.

Some courts have been reluctant to judicially abolish the doctrine, believing it should be done by the legislature. The vast majority of courts which have recently considered abrogation, however, have concluded that there should be no judicial reluctance to abolish a judicially-created rule when it is obvious the rule is inequitable.[14] This court recently expressed a similar view in *United States v. Reliable Transfer Co., Inc.*, ... U.S. ...., 43 L.W. 4610, 4614 (1975). The suggestion that the court should not act because the legislatures have waived immunity in certain areas has not been adopted. The courts read such statutes as meaning only what they say: that in the areas indicated there shall be no governmental immunity, but it is left to the court to decide whether it should adhere to its own rule of immunity in other areas.[15]

In summary, the sovereign stands now before this Court relying upon a defense which is an historical anachronism and has no rational support. The total abolition of sovereign immunity, and replacement of it by adoption of a rule subjecting the Government to the same liabilities to which private citizens are subjected, will be ordered soon by this Court. This Court undoubtedly will elect very shortly to follow the lead of the California Supreme Court and many other State Supreme Courts in holding:

> "Only the vestigial remains of such governmental immunity have survived; its requiem has long been foreshadowed. For years the process of

[14]*Muskopf v. Corning Hosp. Dist., supra,* 218.

[15]*Id.*, 218-19.

erosion of governmental immunity has gone on unabated. The Legislature has contributed mightily to that erosion. The courts, by distinction and extension, have removed much of the force of the rule. Thus, *in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we made no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend.*"[16] (Italics added).

V

Tuna Corporation Can Sue the United States Under the SIA as Amended in 1960.

A. Background of the SIA and PVA.

The SIA and PVA are illustrations of Congress' discontent with the judicially-created doctrine of sovereign immunity. In 1920 Congress sought to relax that doctrine by passing the SIA so as to authorize suits against the United States for damage caused by its merchant vessels.[17] Aliens were not placed under any disability to sue under the SIA. In 1925, Congress, in the PVA, authorized suit against the United States for damage caused by its public vessels.[18] The PVA included the so-called reciprocity clause, which was

[16] *Id.*, 221.

[17] The Act (46 U.S.C. 72) provided:
"in cases where if such vessel were privately owned or operated . . . a libel in personam may be brought against the United States . . . *provided that such vessel is employed as a merchant vessel* . . ." (Italics added).

[18] The Act (46 U.S.C.A. 781) provided:
"A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States for damages caused by a *public vessel* of the United States . . ." (Italics added).

specifically limited in application to the PVA.[19] The reciprocity clause did not then apply, and never has applied, to actions prosecuted under the SIA.

In 1960 Congress broadened the coverage of the SIA by providing in patently plain and unequivocal language: "In cases where if such vessel were privately owned or operated . . . or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . ." (46 U.S.C. 742).

The Government concedes—indeed it has no choice —that the SIA as amended "could be read to encompass suits against the United States regarding any type of vessel, including "public vessels'." (Gov. Br. 17). Any reasonable person reading the amended SIA surely would agree with the Government, as the language admits of no other interpretation. The Government argues, however, that Congress really could not have intended what it said and that, despite its broad language, Congress intended to exclude damage caused by public vessels from coverage of the SIA. It is argued this Court should imply such an exception.

The Government position concerning legislative intent is not accurate. It is quite true the legislative history shows a very substantial concern over uncertainties concerning the jurisdiction of the court of claims and the district courts and a Congressional desire to clarify

[19] The reciprocity clause (46 U.S.C. 785) provided:
"No suit may be brought *under Sections 781-790* (italics) [PVA] of this title by a national of any foreign government unless it should appear to the satisfaction of the Court in which suit is brought that said government under similar circumstances allows nationals of the United States to sue in its courts." (Italics added).

this, and to take the court of claims out of the admiralty business. But the legislative history reflects that Congress was concerned, also, about uncertainty over the merchant-public vessel distinction between the PVA and SIA. It is observed in the Senate Report on the bill that: "A substantial portion of the jurisdiction uncertainty in this area is attributable to confusion in establishing whether a vessel is a 'merchant vessel' or a 'public vessel' "[20] The Senate Report referred also, to *Calmar S.S. Corp. v. United States,* 345 U.S. 446 (1952) as an illustration of problem it wished to correct.[21] In that case the District Court held that a privately owned vessel operated for the government was a merchant vessel within the SIA, the Court of Appeals reversed holding it was a public vessel under the PVA, and this Court reversed again holding it was after all a merchant vessel. Lurking behind the uncertainty concerning the merchant-public vessel distinction and the pointless litigation concerning it was the very real possibility, pointed out at the time by the leading text on maritime law, that it could well happen "that a ship, though not susceptible of being treated as a 'public' vessel, would not pass the test of employment as a 'merchant vessel' and so would fall between the Acts."[22] Congress plainly did not desire this to occur and, further, intended to put a stop to pointless litigation as to whether a ship was a public or merchant vessel. The solution adopted by Congress was simply to abolish the distinction by making the United States

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[20]S. Rep. No. 1894, 86 Cong. 2d Sess., 1960 U.S. Code Cong. & Adm. News, 3583, 3584.

[21]*Id.*, 3584-85.

[22]G. Gilmore and C. Black, *The Law of Admiralty* 775 (1st ed. 1957).

liable to the same extent as any private shipowner. Jurisdiction over this liability was placed under the SIA. There is absolutely nothing in this legislative history, despite the Government's assertion, indicating Congress intended the merchant-public vessel distinction to persevere beyond 1960.

That Congress desired in adopting the 1960 amendment that all maritime claims, including damage caused by public vessels, to be cognizable under the SIA, is confirmed by a Senate Report of August 17, 1972. That report states that the purpose of the 1960 amendment was to extend jurisdiction under the SIA "to the *full range* of admiralty cases which might have been maintained had a private person or property been involved rather than the Government or its agents and employees or property." (Italics added). S. Report No. 92-1079, 92d Cong., 2d Sess. 1972 U.S. Code Cong. and Adm. News, 3129, 3134.

This Court, in *Amell v. United States,* 384 U.S. 158, 164 (1966), an action under the SIA, commented upon the elimination of the merchant vessel limitation in the SIA and the legislative history of the Act, noting:

> "In 1960, Congress addressed itself to the jurisdictional overlap between the Tucker Act and the Suits in Admiralty Act. Its major aim was to empower the Court of Claims to transfer suits to the district courts when the latter had exclusive jurisdiction over them . . . *Simultaneously Congress abolished the distinction between public and merchant vessels, a matter which had sorely confused attorneys and had caused misfilings in the past.*" (Italics added).

One of the foremost experts on maritime law and actions under the SIA and PVA, Norris, has commented:

> "The intent of the Suits in Admiralty Act is to impose upon the United States the same liability—apart from seizure or arrest under a libel in rem—as is imposed by the admiralty law on the private shipowner."[23]

Even the United States, when to its advantage, admits the SIA as amended was intended as the exclusive remedy for all admiralty claims against the United States. For example, in *Tankrederiet Gefion A/S v. United States,* 451 F.Supp. 83, 84 (E.D. Mich. 1964): *"The Government also argues that Congress intended to make it perfectly clear by such amendment that the Suits in Admiralty Act was to provide the exclusive remedy, not merely for admiralty claims involving Government vessels, but for all admiralty claims against the United States.* 1960 U.S. Code Cong. and Adm. News, p. 3585." (Italics added). In *J. W. Peterson Coal & Oil Co. v. United States,* 323 F.Supp. 1198, 1204 (N.D. Ill. 1970): "The Government contends that by the inclusion of the words 'or if a private person or property were involved' *Congress intended to include all maritime torts within the Suits in Admiralty Act* . . ." (Italics added). In *Roberts v. United States,* 498 F.2d 520, 525 (9th Cir. 1974), cert. den. December 15, 1974 (No. 74-368) the Court of Appeals concluded, as the Government contended:

> "The addition of the phrase 'or if a private person . . . were involved' has been interpreted by a

[23]1 M. Norris, *The Law of Maritime Personal Injuries 3rd,* 339 (3rd ed. 1975).

> majority of courts as a legislative attempt to bring *all maritime torts asserted against the United States within the purview of the SIA."*[24] (Italics added).

The absurdity of the Government's argument that Congress inadvertently adopted broad language which included all maritime torts under the SIA as amended, is obvious when attention is called to the fact that the Civil Division of the Justice Department collaborated with the Maritime Administration in the drafting of this Act and specifically approved it.[25] If the Justice Department, with all of its experienced counsel and expertise concerning the SIA and PVA, and after careful study of the Acts, had intended damage caused by public vessels to be excluded from the Act, doesn't it stand to reason it would have provided so in the Act it co-authored? The reason that it did not do so is that the Justice Department plainly understood Congress' intent to abolish the merchant public vessel distinction once and for all.

In summary, the plain language of the Act admits of only one interpretation, *i.e.,* that claims for damage caused by public vessels, and all other maritime torts, are cognizable under the SIA. The legislative history confirms this conclusion in that it reveals concern over interminable disputes about the public-merchant vessel distinction, and a resolve to end such disputes. This Court previously has so interpreted the Act and its legislative history. Even the Government itself has repeatedly argued in the past that Congress' intention was to place all maritime torts under the SIA.

[24]For a further example of the Government's understanding that all maritime torts now lie under the SIA as amended, see: *T. J. Falgout Boats, Inc. v. United States,* 361 F.Supp. 838, 842, affirmed 508 F.2d 855, petition for cert. filed March 22, 1975 (No. 74-1215).

[25]S. Report No. 1894, *supra,* 3591, 3592.

B. Other Judicial Interpretations of the 1960 Amendment to the SIA.

The view that damage caused by public vessels, as well as all other liability for maritime torts, is included in the SIA has been shared by the Second, Fourth, Fifth and Ninth Circuit Courts of Appeal, and no circuit has taken a contrary view.

The Second Circuit in *Ira S. Bushey & Son, Inc. v. U.S.*, 398 F.2d 167 (2nd Cir. 1968) so held. There, a seaman carelessly flooded a drydock, as a result of which a Coast Guard (public) vessel in the drydock listed and damaged the drydock. The District Court held there was no coverage under the PVA because the damage was not "caused" by the public vessel but was caused instead by the seaman. The Court of Appeals reversed on this ground, holding that the damage was caused by the public vessel. But the Second Circuit added the issue was of little importance since, irrespective of whether or not the claim was cognizable under the PVA, it was cognizable (even though the damage was caused by a public vessel), under the SIA.

The Fourth Circuit reached the same result in *United Philippine Line, Inc. v. Submarine USS DANIEL BOONE*, 475 F.2d 478 (4th Cir. 1973). There, a U.S. Navy submarine, a public vessel, collided with a Philippine merchant vessel near Norfolk, Virginia. The Philippine shipowner sued the United States under the PVA and SIA. The United States answered, setting up lack of reciprocity (under the PVA) as a defense and, also, filed a counterclaim against the Philippine shipowner. The District Court held the filing of a counterclaim waived the PVA reciprocity clause, and the Fourth Circuit affirmed on that point. The Court of Appeals

did not specifically rule as to whether the claim for damage caused by a public vessel would lie under the SIA as amended, but did indicate that if called upon to decide the issue, it probably would rule in favor of the Philippine shipowner. The Court stated:

> "Section 2 of the Suits in Admiralty Act, 46 U.S.C.A. 742, as amended in 1960, would apparently allow such a suit if the section is given a literal interpretation. A literal interpretation of a statute waiving sovereign immunity is generally required. Gulf Oil Corp. v. Panama Canal Co., 407 F.2d 24, 28 (5th Cir. 1969)."[26]

The Fifth Circuit considered a closely-related issue in *De Bardeleben Marine Corp. v. United States*, 451 F. 2d 140 (5th Cir. 1971). There an action for negligent misrepresentation was filed against the United States under the SIA for damages resulting from a careless error appearing in a Government chart. Since the damage was not caused by a merchant vessel, there was no jurisdiction under the SIA prior to 1960 over such a cause. The Government argued there, as it does here, the 1960 amendment to the SIA was intended only to facilitate transfer of cases between the district courts and the Court of Claims and to clarify jurisdictional uncertainties. The Government there, as here, referred to the legislative history of the amendment and argued Congress did not intend to further waive sovereign immunity under the SIA and that it was impermissible for the Court to read in any such purpose. The Court, in overruling the Government's contentions, declared:

> "We reject these contentions. The words of the statute, its legislative history, the liberal approach

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[26] *United Philippine Lines, Inc. v. Submarine USS DANIEL BOONE, supra,* 480 n.5.

in interpreting waivers of immunity, and the senseless absurdities which would result belie the narrow reading that the Government would give to the new (1960) Section 2 of SIA."[27]

The Ninth Circuit in this case, reported at 499 F.2d 774 (9th Cir. 1974), as well as in *T. J. Flagout Boats, Inc. v. United States, supra,* and *Roberts v. United States, supra,* aligned itself with Second, Fourth and Fifth Circuits in holding that the 1960 amendment to the SIA substantially broadened the coverage of the SIA to include all maritime torts. The Government's argument before this Court in behalf of a restrictive interpretation of the SIA, accordingly, has been rejected by every court of appeal to which it has been presented.

The restrictive interpretation of the SIA urged by the Government likewise has been rejected by the majority of district courts which have considered it.[28]

In view of the foregoing, it is obvious there is near unanimous judicial authority rejecting the Government's claim that the SIA should now be restrictively construed so as not to include damage caused by public vessels and all other maritime torts. This weight of judicial opinion is soundly based on the unequivocal language of the Act itself, its legislative history, and even upon the broad interpretation of it many times urged by the Government.

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[27] *De Bardeleben Marine Corp. v. United States, supra,* 145-46.

[28] See *Richmond Marine Panama, S.A. v. United States,* 350 F.Supp. 1210 (S.D.N.Y. 1972); *Pacific Northwest Bell Telephone Co. v. United States,* 378 F.Supp. 297 (W.D. Wash. 1974); *Tankrederiet Gefion A/S v. United States, supra; Utzinger v. United States,* 246 F.Supp. 1022 (S.D. Ohio, 1965); *Tebbs v. Baker-Whitely Towing Co.,* 227 F.Supp. 656 (D. Md. 1964); and *Beeler v. United States,* 224 F.Supp. 973 (W.D. Pa. 1964), rev'd other grounds, 338 F.2d 687.

C. If There Is Any Doubt Concerning Proper Construction of the SIA, It Should Be Broadly and Liberally Construed in Favor of Innocent Victims of Government Negligence.

This principle was explained in *Gulf Oil Corp. v. Panama Canal Co.,* 407 F.2d 24, 28-9 (5th Cir. 1969), where it is noted:

> "In the structure of the Suits in Admiralty Act, 46 U.S.C.A. §741 et seq., the Public Vessels Act, 46 U.S.C.A. §781 et seq., and the Federal Tort Claims Act, 28 U.S.C.A. §1346(b), which expose the government in all of its sovereign glory to almost unlimited liabilities comparable to private parties, the approach is to construe the waiver sensibly, naturally, which means most of the time, literally. Although repeated expressions do not daunt the sovereign's representatives in dragging out the old markers of this ancient shibboleth, they are plain enough to read and heed. '[W]aivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities * * * *R.F.C. v. J.G. Menihan Corp.,* 1941, 312 U.S. 81, 84, 61 S.Ct. 485, 487, 85 L.Ed. 595, 598 [W]e think Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation.' *Canadian Aviator, Ltd. v. United States,* 1944 324 U.S. 215, 222, 65 S.Ct. 639, 643, 89 L.Ed. 901, 907. There is to be no niggardly construction for 'when Congress authorized federal instrumentalities of the type here involved to "sue and be sued", it used those words in their usual and ordinary sense.' *F.H.A. v. Burr,* 1940, 309

U.S. 242, 246, 60 S.Ct. 488, 491, 84 L.Ed. 724, 279."

As stated in *De Bardeleben Marine Corp. v. United States, supra,* 146:

"Finally, any such [restrictive] reading is out of step with that given to similar restrictive efforts in *Rayonier,* note 15, supra; *United States v. Muniz,* 1963, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed. 2d 805; *Indian Towing Co. v. United States,* 1955, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48. No better way to end this discussion can be found than these words from *Rayonier,* supra. 'There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.' (352 U.S. at 320, 77 S.Ct. 374), quoted in *Muniz,* supra (374 U.S. at 166, 83 S.Ct. at 1859).

"The tide of history is running clearly against the concept of sovereign immunity. The disfavor into which the doctrine has fallen was observed as far back as *Keifer & Keifer v. Reconstruction Finance Corporation,* 1939, 306 U.S. 381, 50 S. Ct. 516, 83 L.Ed. 784. In *Gulf Oil Corp. v. Panama Canal Co.,* 5 Cir., 1969, 407 F. 2d 24, this Court pointed out that the assault upon the citadel of immunity continues presently apace. *Any doubts as to its waiver therefore are to be resolved against the sovereign.*" (Italics added).

The Government's only response to the undeniable doctrine of favoring waivers of sovereign immunity is reliance upon the canon of construction that repeal by implication is not favored. The Government overlooks

that this canon has no application for the reason that where, as here, a later act covers the whole subject of the earlier one, the later act controls. *Bank of New York v. Philippine Islands,* 296 U.S. 497, 503 (1935). Parrying with the all too numerous canons of construction, many of which are conflicting in any given situation, is not appropriate when the words used by Congress are unambiguous.[29] Tuna Corporation respectfully submits, further, that if there were any ambiguity, which there is not, the one overriding canon of construction, and it has been emphasized again and again by this Court, is that waiver of immunity statutes should be liberally and literally construed to favor innocent victims of government negligence.

D. The Government's Policy Reasons for Favoring Narrow Construction Are Lacking in Merit.

The Government argues that unless a narrow construction of the SIA is made, naval officers and crew members will be subpoenaed and cases will be pushed to trial, all of which will seriously prejudice the security of naval operations.[30] The Government overlooks that federal courts have broad discretion over subpoenas and trial dates and to judicially stay actions where appropriate. Plainly no court would permit action which would harm naval operations.

The Government argues that prejudgment interest is recoverable under the SIA, whereas it is not under the PVA, and that if permitted to sue under the SIA, Tuna Corporation may recover $250,000 in interest.[31]

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[29]*Dist. of Columbia Nat. Bank v. Dist. of Columbia,* 348 F. 2d 808, 809 (D.C. Cir. 1965).

[30]Gov. Br. 22.

[31]Gov. Br. 23.

Tuna Corporation wishes to emphasize that prejudgment interest is discretionary under the SIA and will not be awarded except where it is equitable,[32] and this rule, incidentally, prevails in all collisions involving private shipowners.[33] In short, equity will be done and the Government can hardly object to this, especially because it frequently collects prejudgment interest from private shipowners.

The Government argues, further, that to construe the SIA as Tuna Corporation contends, *i.e.*, for it to include all maritime torts, will create an "irrational statutory scheme".[34] Nothing could be less correct. The simplest statutory scheme of all is to provide, as Congress has done, that the Government shall henceforth be liable to the same extent as any private shipowner. The Government position, if adopted, on the other hand, would preserve the public-merchant vessel and resulting jurisdictional uncertainty, as well as the possibility that certain Government ships may be neither public or merchant. The Government interpretation will reinstitute the irrational statutory scheme Congress specifically sought to correct.

VI

Tuna Corporation Can Recover Under the PVA, in Any Event, Since It Is an American Shipowner.

Admiralty courts disregard the corporate entity and fix the rights and obligations of shipowners according to the citizenship of the vessels owner's shareholders. In *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306

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[32] *Richmond Marine Panama, S.A. v. United States*, 350 F. Supp. 1210, 1221 (S.D.N.Y. 1972).

[33] *Dyer v. National Steam Nav. Co.*, 118 U.S. 507, 519 (1886).

[34] Gov. Br. 8.

(1970) the admiralty practice of disregarding the legal state of incorporation was stated. In that case a seaman sued a Greek corporation which owned the vessel on which he has been employed when injured. It was shown that 95% of the stock of the Greek Corporation which owned the vessel was owned by a Greek citizen who resided permanently in the United States. The Court held that it would disregard the Greek corporation and treat the owner as American due to the residency here of the principal stockholder and his control of the corporation from the United States. The Court declared:

> "If . . . the liberal purposes of the Jones Act are to be effectuated, the facade of the operation must be considered as minor, compared with the real notion of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States." (p. 310).

And, as stated in *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 442 (2nd Cir. 1959), cert. den. 357 U.S. 1000:

> "Although appellant contends otherwise, the practice in this type of case of looking through the facade of foreign registration and incorporation to the American ownership behind it is well established. *Gerradin v. United Fruit Co.*, 2d Cir. 1932, 60 F. 2d 927, cert. den. 287 U.S. 642, 53 S.Ct. 92, 77 L.Ed. 456; *Carroll v. U.S.*, 2d Cir. 1943, 133 F. 2d 690; *Zielinski v. Empresa Hondurena de Vapores*, S.D.N.Y. 1953, 113 F. Supp. 93 . . ."

The cases above cited concerned Jones Act claims. So far as Tuna Corporation knows, this is the first time this issue has been raised under the Public Vessels Act, but the same result logically follows because it is settled that the Public Vessels Act, like the Jones Act, is to be construed liberally and applied in favor of claimants. See, *Orion Shipping & Trading Co. v. U.S.*, 247 F.2d 755, 757 (9th Cir. 1957).

Tuna Corporation is an alien only insofar as its state of incorporation is concerned. It was formed by Americans pursuant to Congressionally-adopted national policy of encouraging investment in friendly less-developed nations. See S. Report No. 1881, 87th Cong., 2d Sess. 1962 U.S. Code and Admin. News, 3371. All of its funds were furnished by Americans; 99% of its stock was owned by Americans, who pay United States taxes; all of its activities were directed and controlled by Americans from America; its vessel was purchased and outfitted in the United States; and the loss occurred in American waters. Most importantly, the million dollar loss occasioned by the sinking of the ORIENT has been borne by American citizens.

It is respectfully submitted that under the law established by this Court, Tuna Corporation should be treated as an American shipowner and should not be barred from recovering under the PVA by reason of the reciprocity clause.

VII

Even if Tuna Corporation Were Treated Under the PVA as a Philippine Shipowner, Which It Should Not Be, the Reciprocity Clause Would Be No Bar to Recovery Because It Is Unconstitutional.

Even if this Court concludes that Tuna Corporation can sue only under the PVA, and that Tuna Corporation should be treated as a Philippine shipowner, Tuna Corporation still has standing to sue under the PVA since the reciprocity clause therein denied equal protection of the laws to Filipinos and, accordingly, is unconstitutional.

Graham v. Richardson, 403 U.S. 365 (1971) is the leading case at this time concerning extension of equal protection to aliens. It is there emphasized that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. "Aliens as a class are a prime example of 'discrete and insular' minority [citation omitted] for whom such heightened judicial solicitude is appropriate." (372).

Just as it is unconstitutional to discriminate without any substantial justification against aliens as a group, it is likewise unconstitutional to discriminate against certain groups of aliens while according equal protection to others. In *Sei Fujii v. State of California*, 38 Cal.2d 718 (1952) the California Supreme Court reviewed the constitutionality of a state statute which prohibited ownership of land by aliens ineligible for citizenship under our naturalization laws, but permitted

other aliens to own land. In declaring the Act to be unconstitutional, the Court observed (733):

> ". . . there can be no justification for a classification which operates to withhold property rights from some aliens, not because of anything they have done or any beliefs they hold, but solely because they are Japanese [who were not eligible for citizenship] and not French or Italian [who were eligible for citizenship]."

What overriding legislative justification is there to permit discrimination against Filipinos of the most onerous nature, *i.e.*, the taking and destroying of their property without just compensation? There is none! Indeed, the basic inequity of the rule is astounding when it is recognized that Tuna Corporation and other Philippine companies can be, and are, sued by the United States if they damage a United States public vessel. See *United Philippine Line v. United States, supra.* Not only can the United States sue Philippine citizens in the United States, but it can, if it wishes, sue them in the Philippine courts. Philippine Civil Code, Sections 2176, 2180. There may be some justification for refusing a remedy to the Philippine Government if it cannot be sued, but there is no justification whatsoever for denying an individual Philippine citizen the right to sue the United States when the United States can and does sue him.

The "reciprocity" clause plainly fails all tests of basic fairness and cannot withstand close judicial scrutiny. In light of equal protection, it is patently unconstitutional.

VIII

Conclusion.

For the foregoing reasons, Tuna Corporation respectfully submits that the judgment of the Court of Appeals should be affirmed. The United States should not be permitted to negligently destroy property of innocent parties and then deny them a day in court.

Respectfully submitted,

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Supreme Court, U. S.
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No. 74-869

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED CONTINENTAL TUNA CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

In our main brief we demonstrated that respondent's complaint against the United States was cognizable solely under the Public Vessels Act, 46 U.S.C. 781 *et seq.*, and that the district court properly dismissed the suit because respondent had failed to satisfy the reciprocity requirement of the Act (46 U.S.C. 785). Respondent now proffers as grounds for affirmance of the judgment of the court of ap-

peals, which reversed the district court's decision, contentions that were either rejected or not considered below. We briefly reply to these subsidiary contentions.

1. Respondent urges (Br. 5-10) the Court to abolish the doctrine of sovereign immunity. The doctrine that the United States may not be sued without its consent is, however, firmly embedded in our jurisprudence and has been consistently reaffirmed by this Court. *E.g.*, *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 141-142; *Honda* v. *Clark*, 386 U.S. 484; *Dugan* v. *Rank*, 372 U.S. 609. In any event, respondent's argument is irrelevant here, for Congress, by virtue of the Public Vessels Act, has placed express limits upon the jurisdiction of the federal courts to hear the type of suit brought by respondent, and respondent's suit falls outside those limits. Thus, respondent's suit is barred not by the broad doctrine of sovereign immunity as such but rather by a specific statutory jurisdictional limitation.

2. Respondent also argues (Br. 22-24) that, even if its suit is cognizable solely under the Public Vessels Act, it is in fact a national of the United States, rather than a "national of any foreign government," and therefore is not subject to the reciprocity requirement contained in that Act (46 U.S.C. 785). But respondent should not be permitted to challenge in this Court, for the first time, a factual premise

which it set forth in its complaint and upon which the parties and both courts below have proceeded.[1]

In its complaint, respondent expressly alleged that it was "a Philippine corporation" (A. 5). The settled rule is that "a corporation of a foreign State is, for purposes of jurisdiction in the courts of the United States, to be deemed, constructively, a citizen or subject of such State." *Steamship Co.* v. *Tugman*, 106 U.S. 118, 121.[2] Accordingly, respond-

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[1] Respondent did move in the district court to substitute as parties plaintiff certain individuals and corporations, allegedly its American shareholders, on the basis of the representation of its counsel that respondent had been dissolved and its assets distributed to its shareholders (A. 11-13). In the affidavit attached to the motion, respondent's counsel acknowledged that *respondent* was "a Philippine corporation" (A. 12). The district court denied the motion for substitution (A. 17), pointing out that, even if counsel's representations were true, respondent had no cause of action under the Public Vessels Act because it had failed to satisfy the reciprocity requirement and that dissolution of the corporation could not create a cause of action in the shareholders not possessed by the corporation (Pet. App. 14a-15a). The shareholders appealed from this ruling (Pet. App. 2a-3a), but the court of appeals affirmed (Pet. App. 8a). The shareholders did not seek certiorari.

Thus it is only in this Court that respondent has claimed that *it* has always been a national of the United States and not of the Philippines.

[2] As this Court observed in *Lauritzen* v. *Larsen*, 345 U.S. 571, 587, "it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries" (footnote omitted). As a result, in dealing with claims of injured seamen under the Jones Act, 46 U.S.C. 688, "our courts on occasion have

ent's allegation of incorporation in the Philippines constituted a concession of the fact of Philippine nationality. The district court's decision rested upon that allegation, and the court of appeals did not dispute the factual premise of that decision. Since the fact of Philippine nationality was uncontested in the courts below, litigation of that factual issue in this Court is inappropriate. Cf. *United States* v. *Reliable Transfer Co.*, No. 74-363, decided May 19, 1975, slip op. 5, n. 2; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.[3]

3. Finally, respondent contends (Br. 25-27) that even if its suit is cognizable solely under the Public Vessels Act and it is found to be a national of the Philippines, the suit nevertheless is not barred because the reciprocity requirement denies due process to Philippine nationals. Respondent did not make this contention in the district court, and we are advised by the government's appellate counsel that the

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pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them" (*ibid.*; footnote omitted). But while the liberal policies underlying the Jones Act have led courts occasionally to apply American law against American shipowners who have obtained foreign registration solely to escape the obligations imposed by that law, as in the cases cited by respondent (Br. 22-24), no court has ever permitted a foreign corporation to escape the jurisdictional requirements imposed by American law under the Public Vessels Act by shedding its foreign nationality when it might be to its benefit to do so. This is, apparently, what respondent wishes to do here.

[3] Moreover, respondent has never adduced any evidence in support of its eleventh-hour claim of American nationality.

court of appeals at oral argument refused to consider it for that reason. Since respondent's late-blooming constitutional claim, which relates to complex matters concerning the conduct of foreign affairs and the rights of nonresident aliens, was not made in the district court and was not considered by the court of appeals, and since it is one of first impression, this Court should follow its usual practice and decline to consider it. *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164; *Ramsey* v. *United Mine Workers*, 401 U.S. 302, 312.[4]

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[4] In any event, we believe that the statutory classification challenged by respondent has a rational basis, and is therefore constitutional, since it only discriminates against nationals of foreign countries that discriminate in the same manner against nationals of the United States.

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